

ARBITRARY DETENTION? THE IMMIGRATION DETENTION BED QUOTA

ANITA SINHA*

ABSTRACT

When President Obama took office in 2009, Congress through appropriations linked the U.S. Department of Homeland Security's (DHS) funding to "maintaining" 33,400 immigration detention beds a day. This provision, what this Article refers to as the bed quota, remains in effect, except now the mandate is 34,000 beds a day. Since 2009, DHS detentions of non-citizens have gone up by nearly 25 percent. To accommodate for this significant spike over a relatively short period of time, the federal government has relied considerably on private prison corporations to build and operate immigration detention facilities.

This Article takes a comprehensive look at the Congressional immigration detention bed quota. It details its legislative history, and the relationship between the quota and private prisons in the immigration detention system. It situates the provision in a conversation about quotas generally, both in the law enforcement context and also in relation to the significance of quotas in U.S. immigration law historically. The Article then examines the bed quota through the lens of foundational as well as present-day jurisprudence on immigration detention and the Due Process Clause of the Fifth Amendment of the U.S. Constitution. It also

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*Assistant Professor of Law and Director, International Human Rights Law Clinic, American University, Washington College of Law. For helpful conversations and comments, I am grateful to Muneer Ahmad, Susan Carle, Janie Chuang, Elizabeth Keyes, Annie Lai, Binny Miller, and Jayesh Rathod. I would like to thank the participants in the *Crimmigration Lecture Series*, especially César Cuauhtémoc García Hernández and Christopher Lasch. I also greatly benefitted from the feedback I received from participants in the *LatCrit Critical Constitutionalism* conference and the *Clinical Law Review Workshop*. Thanks also to Juliana Perez Calle, Kamille Go, and Christina Moerhle for their fantastic research assistance. Lastly, I am grateful to the phenomenal students of the *Duke Journal of Constitutional Law & Public Policy*, in particular Priya Khangura and Trey O'Callaghan. All errors are my own. I dedicate this Article to Savi the fighter and his co-warriors Marcel and Rachid.

analyzes the quota through international human rights law, particularly the protections related to arbitrary detention and vulnerable migrants. The Article concludes with policy considerations that caution against Congress imposing the immigration detention bed quota.

INTRODUCTION

Thirty years of failed federal immigration law reform efforts have changed the way U.S. immigration policies are made. Rather than doing nothing about the approximately eleven million undocumented immigrants living in the country,¹ entities beyond the federal legislative branch have gotten involved in the regulation and enforcement of immigration. In fact, “the great bulk of contemporary immigration policymaking stems not from Congress, but rather from executive branch agencies and states.”²

This modern version of American immigration policymaking raises novel questions as to which governing bodies can, or from a public policy perspective should, regulate and enforce immigration laws. One set of inquiries involves states legislating immigration control measures,³ a type of contemporary immigration policymaking.⁴ The

1. Jens Manuel Krogstad et al., *5 Facts About Illegal Immigration in the U.S.*, PEW RESEARCH CENTER (Sept. 20, 2016), <http://www.pewresearch.org/fact-tank/2015/07/24/5-facts-about-illegal-immigration-in-the-u-s/>.

2. Catherine Y. Kim, *Immigration Separation of Powers and the President's Power to Preempt*, 90 NOTRE DAME L. REV. 691, 692 (2014).

3. See Carrie L. Rosenbaum, *The Role of Equality Principles in Preemption Analysis of Sub-Federal Immigration Laws: The California TRUST Act*, 18 CHAP. L. REV. 481 (2015) (describing the trend of state laws seeking to regulate immigration as “sub-federal immigration laws”), Hidetaka Hirota, *The Moment of Transition: State Officials, the Federal Government, and the Formation of American Immigration Policy*, 99 J. AM. HIST. 1092 (2013) (stating that prior to the late 1800s, before the creation of federal immigration law, immigration regulation and enforcement was a matter of state law, but for a brief period in in the late 18th century), Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1881 (1993) (“[T]he federal government briefly entered the alien regulation business in 1798.”); see also Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749 (2011) (describing how Arizona, despite formal prohibition on state and local immigration regulation, prosecutes immigration-related crimes, and arguing how through local prosecutors, the state is nonetheless restructuring the federal system for punishing immigration crime).

4. See Ian Gordon & Tasmeen Raja, *164 Anti-Immigration Laws Passed Since 2010? A Mojo Analysis*, MOTHER JONES (Mar. 2012) (showing that the height of state anti-immigration laws was 2010-2011, when 164 such laws were passed), <http://www.motherjones.com/politics/2012/03/anti-immigration-law-database>; see also Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339 (2013) (arguing that state immigration laws are enacted less for their impact and more for shaping federal immigration policy making); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001) (arguing that the devolution of immigration authority to states by Congress

most prominent example is Arizona's Support Our Law Enforcement and Safe Neighborhoods Act, commonly referred to as S.B. 1070. The U.S. Supreme Court in 2012 struck down three of the statute's four provisions challenged by the Obama Administration.⁵ The Court withheld judgment on the constitutionality of S.B. 1070's "show your papers" or "papers please" provision,⁶ which requires police officers to determine the immigration status of any person they lawfully stop, detain, or arrest if "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States."⁷ Since the *Arizona v. United States* decision, restrictive immigration state laws have been on the downturn.⁸

The other recent manifestation of contemporary immigration policy making is executive orders, namely Deferred Action for Childhood Arrivals (DACA) announced by President Obama in June 2012, and expanded DACA and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) announced in November 2014.⁹ The second executive actions were enjoined by the

contradicts the notion of sovereignty and thus should not receive the deference granted traditionally to federal immigration law).

5. *Arizona v. United States*, 567 U.S. __ (2012). For a summary of the decision, see David Martin, *Reading Arizona*, 98 VA. L. REV. IN BRIEF 41 (2012).

6. Adam Liptak, *Blocking Parts of Arizona Law, Justices Allow Its Centerpiece*, N.Y. TIMES (June 25, 2012), http://www.nytimes.com/2012/06/26/us/supreme-court-rejects-part-of-arizona-immigration-law.html?_r=0; see also Hardy Haberman, 'Your Papers Please!', DALLAS VOICE (May 6, 2010, 2:39 PM), <http://www.dallasvoice.com/your-papers-please-1020702.html> (linking Arizona's law with the phrase "your papers please" used in Nazi Germany).

7. ARIZ. REV. STAT. ANN. § 11-1051(B) (2012). In 2013, the Arizona Civil Rights Advisory Board heard from undocumented immigrants testifying on the negative impact the "show me your papers" provision has had on the community. Valeria Fernández, *Three Years After Passing Its "Papers, Please" Law, Arizona Is Divided by Distrust and Fear*, ALTERNET (Mar. 29, 2013), <http://www.alternet.org/civil-liberties/three-years-after-passing-its-papers-please-law-arizona-divided-distrust-and-fear>. In 2014, the Obama Administration agreed to drop their challenge of this provision. Howard Fischer, *Brewer, Feds Cut Deal on SB1070's "Papers Please" Provision*, ARIZ. CAPITOL TIMES (June 10, 2014, 7:56 AM), <http://azcapitoltimes.com/news/2014/06/10/az-sb1070-jan-brewer-deal-on-papers-please-provision/>.

8. Catalina Restrepo, *Annual Review of State-Level Immigration Policy Still Trending Pro-Immigrant*, AMERICAN IMMIGRATION COUNCIL IMMIGRATION IMPACT (Aug. 11, 2015), <http://immigrationimpact.com/2015/08/11/state-immigration-laws-2015/>. For additional analysis of the *Arizona v. United States* decision, see, e.g., Lucas Guttentag, *Immigration Preemption and the Limits of State Power: Reflections on Arizona v. United States*, 9 STAN. J. C.R. & C.L. 1 (2013); Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2013 SUP. CT. REV. 31 (2012) (arguing that the Supreme Court's decision made the case as much about separation of powers than about federalism). For a perspective arguing that SB 1070 was a constitutional state legislative act, see Calvin L. Lewis et al., *Why Arizona Senate Bill 1070 is Constitutional and Not Preempted by Federal Law*, 89 U. DET. MERCY L. REV. 283 (2012).

9. Jennifer G. Parser & David L. Woodard, *President Obama's Executive Action on Immigration Policy*, THE NAT'L L. REV. (Dec. 1, 2014), <http://www.natlawreview.com/article/>

Southern District of Texas,¹⁰ on the grounds that the programs exceed the President's immigration power.¹¹ The Fifth Circuit affirmed the District Court's decision.¹² This case then went up to the Supreme Court,¹³ and in June of 2016, the Supreme Court in a 4-4 tie failed to provide guidance on the proper allocation of immigration powers between the Executive and Congress.¹⁴

This Article circles back to a traditional site of immigration policymaking, namely Congress, to examine the extent to which the Legislature can prescribe the Executive branch's enforcement of immigration law. Importantly, it does so taking into account the context of modern immigration policymaking. The federal legislative act that is the inquiry of this Article is the immigration detention bed quota Congress mandates through the U.S. Department of Homeland

president-obama-s-executive-action-immigration-policy. While the trend of state anti-immigrant laws has reversed after the Supreme Court's ruling in *Arizona v. United States*, those who supported both sides claimed the Supreme Court's decision was a victory. See Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 602 (2013).

10. The decision by the court to apply the injunction nation-wide is being challenged in Complaint, *Batalla Vidal v. Baran et. al.*, No. 16-cv-04756 (E.D.N.Y. Aug. 25, 2016). The Plaintiff in *Batalla* applied and was granted a three-year period of deferred action and employment authorization based on expanded DACA, Complaint at ¶ 32. However, in May 2015 Defendants revoked his three-year employment authorization after the issuance of the preliminary injunction in *Texas v. United States*, and issued him a two-year employment authorization, Complaint at ¶ 38. The Plaintiff asks the court to declare that the preliminary injunction entered in *Texas v. United States* does not apply to New York residents based on arguments including the Texas District Court's lack of jurisdiction over residents of New York, see Complaint at ¶43, ¶44, and that the revocation of Plaintiff's employment authorization document violated the Administrative Procedure Act (APA), see Complaint at ¶ 58.

11. Kevin Johnson, *Symposium: United States v. Texas - The Road to Perpetual Immigration Gridlock*, SCOTUSBLOG (Feb. 11, 2016, 9:52 AM), <http://www.scotusblog.com/2016/02/symposium-united-states-v-texas-the-road-to-perpetual-immigration-gridlock/>; Jennifer G. Parser, *DAPA and DACA: What Happened to President Obama's Executive Action?*, THE NAT'L L. REV. (July 25, 2015), <http://www.natlawreview.com/article/dapa-and-daca-what-happened-to-president-obama-s-executive-action>.

12. *United States v. Texas*, 787 F.3d 733 (5th Cir. 2015).

13. *United States v. Texas*, 579 U.S. ___ (2016). The Department of Justice unsuccessfully petitioned the Fifth Circuit Court of Appeals to lift the injunction.

14. For different viewpoints on the constitutionality of the November 2014 executive actions, see, e.g., Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U.L. REV. 1183 (2015) (arguing that DAPA exceeds the President's authority); Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. LAW & POL. 213 (2015) (analyzing DAPA through the Take Care Clause and arguing that DAPA falls within the President's powers and duty to execute the laws of Congress); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013) (addressing the original DACA program created by the Executive in 2012 and arguing "that the Constitution's Take Care Clause imposes on the President a duty to enforce all constitutionally valid acts of Congress . . . [and so] there is simply no general presidential nonenforcement power.").

Security's (DHS) appropriations process.¹⁵ The provision was first introduced when President Obama took office in 2009, and ties DHS's funding to maintaining a minimum number of detention beds per day.¹⁶ The quota, initially 33,400 beds, today sets the daily minimum number of immigration detention beds DHS shall maintain at 34,000.¹⁷ This Article explores the legality of the detention bed quota, namely whether the quota violates the Due Process Clause of the Fifth Amendment to the United States Constitution, and international human rights law limitations on arbitrary detention.

There are also policy considerations that this Article will explore with relation to the detention bed quota. First, law enforcement quotas generally contravene agency or individual officers' discretion in a manner that is not in the best interest of society.¹⁸ A long-standing part of the immigration enforcement regime has been prosecutorial discretion, specifically that "[a] favorable exercise of prosecutorial discretion in immigration law identifies the agency's authority to refrain from asserting the fully scope of the agency's enforcement authority."¹⁹ The Supreme Court's deadlock in *United States v. Texas* leaves in place the lower court's injunction of the Executive's DAPA and expanded DACA programs.²⁰ In doing so, it remains unresolved whether the President's power of prosecutorial discretion in immigration law includes the authority to create such programs.²¹ While

15. Department of Homeland Security Appropriations Act, Pub. L. No. 114-4, 129 Stat. 39, 43 (2015). See also Nick Miroff, *Controversial Quota Drives Immigration Detention Boom*, WASHINGTON POST (Oct. 13, 2013) ("We know ICE can fill more than 34,000 beds, so why would they use less?" said [John] Culberson [R-TX], a member of the House Homeland Security appropriations subcommittee, which ties ICE funding to its compliance with the mandate."), https://www.washingtonpost.com/world/controversial-quota-drives-immigration-detention-boom/2013/10/13/09bb689e-214c-11e3-ad1a-1a919f2ed890_story.html.

16. Philip L. Torrey, *Immigration Detention's Unfounded Bed Mandate*, in IMMIGRATION BRIEFINGS 5 (Apr. 2015).

17. Department of Homeland Security Appropriations Act, Pub. L. No. 114-4, 129 Stat. 39, 43 (2015).

18. The prosecutorial discretion power in the immigration context is distinct from that in the criminal context, the latter which has been criticized as perpetuating systemic racial disparities. See Angela J. Davis, *In Search for Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821 (2013).

19. SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* 7 (2015) (showing that the Executive has applied this discretion, historically and in recent times, to both individual and groups).

20. Mark Joseph Stern, *In a Tied Vote, the Supreme Court Blocks Obama's Immigration Actions*, SLATE (June 23, 2016, 11:11 AM), http://www.slate.com/blogs/the_slatest/2016/06/23/united_states_v_texas_ties_obama_immigration_executive_actions_blocked.html.

21. Shoba Sivaprasad Wadhia, *Symposium: A Meditation on History, Law, and Loss*, SCOTUSBLOG (June 23, 2016, 2:08 PM), <http://www.scotusblog.com/2016/06/symposium-a-meditation-on-history-law-and-loss/>.

it is still an open question for some whether the President should be able to implement these deferred action programs, the judicial impasse in *United States v. Texas* does not implicate the Executive's long-standing discretion over immigration enforcement. As such, agency discretion over non-citizen removal and detention remains both an important component of modern immigration policymaking and, more specifically, a crucial consideration when examining the Congressional immigration bed quota.

Second, quotas generally have demonstratively compelled action that runs counter to core democratic principles of non-discrimination and the deprivation of liberty interests as a last resort. For example, enforcement quotas have been linked to police officers using racial profiling.²² The immigration bed quota specifically delinks detention decisions from individualized determinations concerning public safety. As articulated by a former Immigrations and Customs Enforcement (ICE) director:

Having a mandate out there that says you have to detain a certain number – regardless of how many folks are a public safety threat or threaten the integrity of the system – doesn't seem to make a lot of sense. You need the numbers to drive the detention needs, not set an arbitrary number that then drives your operation.²³

The Congressional bed quota has resulted in unprecedented detention numbers.²⁴ Since 2009, “the number of non-citizens DHS detains yearly has increased by nearly 25 percent.”²⁵ And this practice

22. See *infra* Part I.C.

23. *Banking on Detention: Local Lockup Quotas & the Immigrant Dragnet*, DETENTION WATCH NETWORK & CENTER FOR CONSTITUTIONAL RIGHTS 2 (2015) [hereinafter *DWN/CCR Report*] (quoting former ICE Director John Sandweg in a September 2013 interview with Bloomberg).

24. Some have in fact attributed the expansion of the immigration detention system to the Congressional bed quota. See, e.g., CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW 242 (2015) (“Aside from the many statutes that authorize or require detention . . . the size of today’s civil immigration detention estate can be attributed to a congressional directive known as the ‘bed mandate.’”).

25. Mark Noferi, *Immigration Detention: Behind the Record Numbers*, CENTER FOR MIGRATION STUDIES (2014), <http://cmsny.org/immigration-detention-behind-the-record-numbers/>. The average daily population increased almost five-fold between 1995 and 2011. See Doris Meissner et. al, *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, MIGRATION POLICY INSTITUTE 11 (the increase being from 7,475 to 33,330 detainees in ICE custody per day). According to the most recent DHS annual report available, in 2013 ICE detained 440,557 individuals. See John F. Simanski, *Immigration Enforcement Actions: 2013*, U.S. DEPT OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS 6 (Sept. 2014), https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf. The 2013 figure was about 8% below the record-breaking number of detentions in Fiscal Year 2012, when 477,000 individuals were in ICE custody. See *DWN/CCR Report*, *supra* note 23 at 1. The number

comes at a considerable price. Generally, with regard to immigration enforcement, “[t]he US government spends more on its immigration enforcement agencies than on all its other principal criminal federal law enforcement agencies combined.”²⁶ The expenditure of these funds for detention largely lines the pockets of for-profit corporations, because more than half of immigration detention beds are operated by private prison corporations.²⁷ The profits generated by these corporations’ immigration detention operations grew after Congress passed the bed quota.²⁸ And the lobbying expenditures by these prison companies, including those spent on Congress members on the Appropriations Committee,²⁹ has ensured that the spike in detention beds remains the status quo.

One could argue that just because Congress requires that DHS “maintain” a specific number of beds does not mean that the Executive needs to fill them. This is not the view of certain legislators and DHS officials. One of the most recent examples is statements made by Representative John Culberson (R-TX), who said, “he expects the Obama Administration to find enough illegal immigrants to fill the detention beds Congress funds—or face budgetary consequences.”³⁰ Moreover, corporations with whom the agency contracts to operate over half of the detention system often get paid regardless of whether the beds are occupied.³¹ In any case, an interpretation of the statutory language of the bed quota as only requiring the agency to ensure 34,000 beds are available per day (not filled) is still troubling from a policy perspective.

This Article proceeds as follows. Part I presents the legislative history of Congress’s inclusion of the immigration bed quota in the

of noncitizens detained in 2012 was more than double the number of individuals detained by ICE in 2001, see *Stakeholder Submission to the United Nations Universal Periodic Review 22nd Session of the Working Group on the UPR Human Rights Council*, THE ADVOCATES FOR HUMAN RIGHTS & DETENTION WATCH NETWORK 9 (Apr.-May 2015), http://www.theadvocatesforhumanrights.org/uploads/us_hrc_-_migrant_detention_-_sept_2014_2.pdf.

26. Meissner et al., *supra* note 25, at 9 (emphasis in original).

27. *DWN/CCR Report*, *supra* note 23, at 1. Sixty-two percent of immigration detention beds are operated by private prison corporations. Moreover, many government-owned immigration detention facilities use “privately contracted detention-related services such as food, security, and transportation.” *Id.*

28. See *infra* Part II.B.

29. See *infra* text accompanying notes 83–85.

30. Sarah Chacko, *Administration Warned to Keep Detention Beds Full*, CQ ROLL CALL, 2015 WL 1964623 (2015).

31. Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007).

DHS Appropriations bill, including opposition to the measure by both Congress members and civic society. It weaves in both private prison corporations and the role that quotas have played in law enforcement generally, and in particular U.S. immigration law. Part II begins with a Due Process analysis of the Congressional immigration detention bed quota under the Fifth Amendment of the U.S. Constitution. It summarizes the historical and current jurisprudence of due process limitations on immigration detention and examines how the bed quota fares. Part II also applies international human rights law implicated by Congress's imposition of a detention quota. Part III raises policy considerations relevant to both the relationship between Congress and the Executive branch on the issue of immigration enforcement and American society at large.

I. BACKGROUND

The immigration enforcement scheme, including detention, is a civil, not criminal, system.³² This distinction, however, is virtually a legal fiction.³³ Immigration detention facilities, even those holding women and children, look and operate like prisons.³⁴ DHS contracts with prisons and jails, and so immigration and criminal detainees are also held together, side by side in the same facilities.³⁵

Since the creation of the modern federal immigration system in 1965 with the enactment of the Immigration and Nationality Act

32. See Subhash Kateel & Aarti Shahani, *Families for Freedom Against Deportation and Delegalization*, in *KEEPING OUT THE OTHER: A CRITICAL INTRODUCTION TO IMMIGRATION ENFORCEMENT TODAY* 263 (David C. Brotherton & Philip Kretsedemas, ed., 2008) (“On the books, detention and deportation are civil—rather than criminal—processes run by the executive branch, not punishments given by the judiciary. For most detainees, it means that you are held like a prisoner without the niceties of the criminal justice system.”).

33. Juliet P. Stumpf, *Civil Detention and Other Oxymorons*, 40 *QUEENS L.J.* 55 (2014).

34. Raul A. Reyes, *America's Shameful "Prison Camps"*, CNN (July 23, 2015), <http://www.cnn.com/2015/07/23/opinions/reyes-immigration-detention/>.

35. See Abira Ashfaq, *Invisible Removal, Endless Detention, Limited Relief: A Taste of Immigration Court Representation for Detained Noncitizens*, in *KEEPING OUT THE OTHER: A CRITICAL INTRODUCTION TO IMMIGRATION ENFORCEMENT TODAY* 199 (David C. Brotherton & Philip Kretsedemas, ed., 2008) (describing immigrant detainees held in county jails: “You obey the rules of the jail. The jail guards treat you like any other prisoner. The administration gives you a number, a bed and a commode, and library hours just like any other prisoner. In fact, you are worse off because you cannot participate in the educational programs county inmates can participate in.”); see also Sarah Dávila-Ruhaak, *ICE's New Policy on Segregation and the Continuing Use of Solitary Confinement Within the Context of International Human Rights*, 47 *J. MARSHALL L. REV.* 1433, 1439 (2014) (“The reality of immigration detention is, however, critically intertwined with the criminal penal system. Immigrant detainees are held in the same facilities as criminally convicted persons and subject to similar, if not the same, treatment.”).

(INA), detention was not a significant or even active component of immigration enforcement.³⁶ Today, however, this history is barely believable, as the detention of non-citizens in the United States is currently the country's largest detention system.³⁷ The most recent chapter of this story involves Congress's immigration detention bed quota.

The immigration detainee population, which was already on the steady rise, increased by twenty five percent after Congress included the quota in DHS's appropriations in 2009.³⁸ Former New York District Attorney Robert Morgenthau, amongst others,³⁹ ascribes the unprecedented immigration detention numbers to the detention bed quota in DHS' appropriations bill:

On any given day, Immigration and Customs Enforcement keeps at least 34,000 immigrants locked up while they wait for their cases to be heard in immigration court. Many of these detainees are incarcerated not because they are dangerous or likely to skip their court dates, but because ICE must meet an arbitrary quota set by Congress.⁴⁰

Morgenthau points out that the immigration detention bed quota is starkly unique: "No other federal or state agency is required by law to detain a specific number of people without any regard to whether the quota makes sense from a law-enforcement perspective."⁴¹ The detention of immigrants currently costs over 2 billion dollars per year, which provides a considerable financial incentive for both private prison companies and local governments looking to pull in revenue for struggling state, county, and municipal budgets.⁴²

This Part presents the legislative history of the bed quota, including considerable opposition to the measure. It then links the bed quota to the prevalence of private prison corporations in the immigration detention system, and concludes with an examination of quotas from

36. Anita Sinha, *Slavery by Another Name*, "Voluntary" Detainee Labor and the Thirteenth Amendment, 11 STAN.J C.R.&C.L. 1, 8-9 (2015).

37. David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 182 (2012).

38. See Noferi, *supra* note 25.

39. See GARCÍA HERNÁNDEZ, *supra* note 24.

40. Robert M. Morgenthau, *The US Keeps 34,000 Immigrants in Detention Each Day Simply to Meet a Quota*, THE NATION (Aug. 13, 2014), <http://www.thenation.com/article/us-keeps-34000-immigrants-detention-each-day-simply-meet-quota/>.

41. *Id.*

42. *Detention Quotas*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/detention-quotas>.

the perspective of law enforcement generally, and within the historical context of immigration law specifically.

A. *The Bed Quota's Legislative History*

The immigration detention bed quota is a product of one line in DHS's custody operations budget. That line, inserted by Congress for the first time⁴³ in DHS's Fiscal Year (FY) 2010 budget, reads: "Provided further, [t]hat funding made available under this heading shall maintain a level of not less than 33,400 detention beds through September 30, 2010."⁴⁴ The number of beds increased to 34,000 in 2012,⁴⁵ which is the number contained in the last DHS Appropriations bill passed in July of 2015.⁴⁶

The legislative movement culminating in this bed quota began in the aftermath of the 9/11 terrorist attacks.⁴⁷ In 2004, Congress passed the Intelligence Reform and Terrorism Prevention Act (IRTPA), which was the first mandate for a stated number of immigration detention beds.⁴⁸ Although a precursor to today's bed quota, IRTPA was different because it directed DHS to increase the "number of beds available for immigration detention."⁴⁹ The legislation also required that the expansion of immigration detention bed capacity be contingent on "the availability of appropriated funds."⁵⁰

The immigration detention bed quota that operates today was introduced during President Obama's first year in office by the late Democratic Senator Robert Byrd from West Virginia, then Chairman

43. In some sources, the bed mandate is stated to appear first in 2007. *See, e.g.*, Esther Yu Hsi Lee, *Homeland Security Head Insists 'Bed Mandate' is Not a Quota to Fill Detention Centers*, THINKPROGRESS (Mar. 12, 2014), <http://thinkprogress.org/immigration/2014/03/12/3391911/jeh-johnson-bed-mandate-quota/>. The FY 2007 DHS budget did add new appropriations to increase the agency's capacity to detain individuals, but it does not precisely relate to the quota that first appears in the FY 2009 DHS budget. *See* Torrey, *supra* note 16, at 4 ("The FY 2007 DHS budget increased the agency's custody operations budget by \$400 million, which was enough money for 6,700 more beds and a total detention capacity of 27,5000 beds.")

44. Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83, 123 Stat. 2149 (2009).

45. While Congress in 2011 failed to pass a DHS appropriations bill, it increased the immigration bed quota to 34,000 by passing the Continuing Appropriations Act of 2011. *See* Torrey *supra* note 16, at 6.

46. Department of Homeland Security Appropriations Act, Pub. L. No. 114-215, 129 Stat. 39, 43 (2015).

47. Torrey, *supra* note 16, at 3.

48. *Id.*

49. *Id.*

50. *Id.* The Bush Administration consistently pushed for increased immigration detention bed capacity, ultimately increasing the total DHS detention capacity to 33,400.

of the Appropriations Subcommittee on Homeland Security.⁵¹ Speaking on behalf of Senator Byrd,⁵² Illinois Democratic Senator Richard Durbin presented the five goals that Senator Byrd had for the new provision:

No. 1, securing our borders and enforcing our immigration laws; No. 2, protecting the American people from terrorist threats and other vulnerabilities; No. 3, preparing and responding to all hazards, including natural disasters; No. 4, supporting our State, local, tribal and private sector partners in homeland security with resources and information; and finally, giving the Department the management tools it needs to succeed.⁵³

These stated objectives, however, do not tell the whole story. Congress's switch from legislating for increased immigration detention capacity to a detention quota was not happenstance—it came at a time when a new, Democratic President announced that he would be more focused on the country's economic recession than immigration policy.⁵⁴ On the one hand, this meant that comprehensive immigration reform would be unlikely, but on the other hand, detaining non-citizens may provide for jobs.⁵⁵ It also was a time, likely because of the recession, when the U.S. was experiencing “a multi-year decline in the undocumented immigration population.”⁵⁶ From a fiscal policy perspective, it seems peculiar that Congress would mandate such high detention rates at taxpayers' expense when unauthorized migration

51. It should be noted that Senator Byrd had a significantly racialized political and legislative past, including with the Klu Klux Klan and voting against the 1965 Civil Rights Act. See Eric Pianin, *A Senator's Shame*, WASH. POST (June 19, 2005), <http://www.washingtonpost.com/wpdyn/content/article/2005/06/18/AR2005061801105.html>.

52. Senator Byrd was seriously ill, which is why Senator Durbin spoke on his behalf, see Torrey, *supra* note 16, at 5.

53. Christina Elhaddad, Note, *Bed Time for the Bed Mandate: A Call for Administrative Immigration Reform*, 67 ADMIN. L. REV. ACCORD 32, 34 (2014), (citing 155 CONG. REC. S7164 (July 7, 2009) (statement of Sen. Richard Durbin)); William Selway & Margaret Newkirk, BLOOMBERG (Sept. 24, 2013, 12:01 AM), <http://www.bloomberg.com/news/articles/2013-09-24/congress-fuels-private-jails-detaining-34-000-immigrants> (quoting a former aide to Senator Byrd who stated that “[t]he senator wanted to ensure that cost increases wouldn't lead ICE to fund fewer beds”).

54. Torrey, *supra* note 16, at 4.

55. See Ginger Thompson & David M. Herszenhorn, *Obama Set for First Step on Immigration Reform*, N.Y. TIMES (June 24, 2009), <http://www.nytimes.com/2009/06/25/us/politics/25immig.html> (“The unemployment rate is expected to stay high, making Democrats who are wavering on immigration reform leery of supporting it.”).

56. Bethany Carson & Eleana Diaz, *Payoff: How Congress Ensures Private Prison Profit With an Immigrant Detention Quota*, GRASSROOTS LEADERSHIP (Apr. 2015), <http://grassrootsleadership.org/reports/payoff-how-congress-ensures-private-prison-profit-immigrant-detention-quota>.

had fallen by more than fifty percent since the recession began.⁵⁷ In fact, Representative David Price, the then-Chair of the House Committee on Appropriations Homeland Security Subcommittee, reportedly tried to prevent the quota's inclusion, stating later that "[i]t's not just pressure, . . . [i]t's a requirement that [DHS] choose one course rather than the other, when the alternatives to detention would be less expensive and equally effective."⁵⁸

1. Opposition to the Bed Quota

Advocacy groups have had a steadfast focus on eliminating the immigration detention bed quota. In particular, Grassroots Leadership, Detention Watch Network, and the Center for Constitutional Rights have presented how the quota is inextricably linked to private prison corporate interests.⁵⁹ In 2014, over one hundred non-governmental organizations submitted a letter to Congress stating, *inter alia*, that ICE's daily detention level should be determined only by actual need and that the quota is contrary to proven best practices in law enforcement.⁶⁰ In 2013, a significant faction of Congress also raised their concerns. Sixty-five members of Congress signed a letter to the White House in opposition to the bed quota, characterizing the provision as compromising the agency's "ability to satisfy its stated enforcement priorities and accomplish detention reform[.]" contrary to constitutionally protected due process protections, and a waste of taxpayer dollars.⁶¹

In 2012 the House Committee on Appropriations issued a report on the FY 2013 proposed budget that recommended that Congress raise the detention bed quota from 33,400 to 34,000 beds. The House at this time was controlled by Republicans, and the "minority views" section of the report, i.e. by the Democratic members, voiced a different perspective. This section was entitled "Burdensome Immigration Provisions," and stated that "the use of those beds should be determined by the enforcement actions and judgment of ICE on

57. See Selway & Newkirk, *supra* note 53.

58. *Id.*

59. See, e.g., Grassroots Leadership *supra* note 56; DWN/CCR Report, *supra* note 23.

60. Letter to Congress Members, *Immigration detention bed mandate in FY 2015 DHS Appropriations* (Jan. 24, 2014), http://immigrantjustice.org/sites/immigrantjustice.org/files/FINAL%20NGO%20sign-on%20bed%20mandate%20-%20Congress%201.24.14_1.pdf.

61. Letter to President Obama from Members of Congress (Sept. 25, 2013), http://immigrantjustice.org/sites/immigrantjustice.org/files/2013_09_25%20Deutch%20Foster%20Bed%20Mandate%20Letter%20to%20Obama.pdf.

whether detention is required for particular detainees.”⁶² It concludes by stating: “We are unaware of any other law enforcement agency with a statutory requirement to detain no less than a certain number of individuals on a daily basis.”⁶³

In 2013, two representatives introduced an amendment to the DHS Appropriations Act of 2014 that would have removed the bed quota. Representative Ted Deutch, one of the amendment’s co-sponsors, said this: “Arbitrary quotas that dictate how many people to keep in jail each day have no place in law enforcement The detention bed mandate forces immigration enforcement officials to focus on filling beds in expensive private detention facilities at the expense of taxpayers and hardworking, decent families.”⁶⁴ The amendment failed 232 to 190, with the votes largely casted along party lines.⁶⁵ The following term, sixty members of Congress signed a letter urging for the end of the detention bed quota.⁶⁶

During this time, the Obama Administration stated the quota was about 2,000 more beds than it deems necessary, which critics of the quota pointed out “represent[s] an added cost of about \$132 million a year.”⁶⁷ Notably, in each of the five years since Congress included the quota into DHS’s annual appropriations, President Obama’s proposed budgets have never included the bed mandate language.⁶⁸ In fact, in one year—in 2014 for FY 2015—the President’s budget request included a request to eliminate the quota, stating the number of beds maintained should be based on actual need.⁶⁹

Facing the threat of a government shut-down, ICE in 2013 released 2,228 detainees to save costs.⁷⁰ This action was immediately

62. Torrey, *supra* note 16, at 6.

63. *Id.*

64. Foster, *Deutch Efforts to end Immigrant Detention Bed Mandate*, TIMES WEEKLY (Dec. 16, 2014, 9:21 PM), <http://thetimesweekly.com/news/2014/dec/16/foster-deutch-efforts-end-immigrant-detention-bed/>.

65. See Selway & Newkirk, *supra* note 53.

66. Katharina Obser, *The Outdated Immigrant Detention System*, THE HILL (Oct. 18, 2013, 6:00 PM), <http://thehill.com/blogs/congress-blog/judicial/329325-the-outdated-immigrant-detention-system>.

67. Andy Sullivan, *Insight: Congress Keeps Detention Quota Despite Immigration Debate*, REUTERS (July 8, 2013, 5:32 PM), <http://www.reuters.com/article/2013/07/08/us-usa-immigration-detention-insight-idUSBRE96711920130708>.

68. President Obama’s FY 2013 and 2014 proposed budgets requested a reduction in detention capacity. See Torrey, *supra* note 16, at 6–7.

69. Bessie Muñoz, *Immigrants for Sale: Corporate America Puts a Price Tag on Sexual Abuse*, 17 SCHOLAR 553, 563 (2015).

70. César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103

reprimanded by the House of Representative's then-Chair to the Homeland Security Committee as a "clear violation of statute,"⁷¹ a reference to the bed quota in DHS's Appropriations bill. The agency was summoned to Congress to explain its actions. During this April 2013 Congressional hearing, then-DHS Secretary Janet Napolitano called the quota "artificial" and stated that lowering the quota would allow the agency to provide alternatives to detention for low-risk, non-U.S. citizens facing removal: "We ought to be detaining according to our priorities, according to public-safety threats, level of offense and the like, . . . not an arbitrary bed number."⁷²

Two years later, however, a Congressional appropriations committee member suggested doubling down on the bed quota. During an April 2015 hearing on the Immigration and Customs Enforcement budget, Representative John Culberson (R-TX), after a heated back and forth with then-ICE director Sarah Saldana, suggested that the current language in the DHS appropriations bill should be amended to substitute the word "maintain" with "fill."⁷³

Representative Culberson's comment demonstrates how, despite the formidable opposition to the bed quota, proponents steadfastly support the provision as a key component of DHS's appropriations. Private prison corporations, the main benefactors of the bed quota, are a significant part of the reason why.

B. The Detention Bed Quota and Prison Corporation Profits

The private prison industry has a dominating presence in the U.S. immigration detention system, a fact inextricably related to the immigration detention bed quota. Corporate control over much of immigration detention is a phenomenon that emerged in the criminal justice context, amidst the political climate of the 1980s marked by the "War on Drugs."⁷⁴ With waning opportunities to maximize its profits in

CAL. L. REV. 1449, 1500 (2015) (stating that even though "ICE conducted public safety and flight risk assessments and released only those presenting a low probability of both risks," Republican congress members publicly accused the agency for releasing criminals and endangering Americans).

71. See Selway & Newkirk, *supra* note 53.

72. *Id.* ("In 2009, the year Congress set the bed quota, as many as 25 lobbyists represented [CCA] on budget and appropriations issues, according to filings with Congress.").

73. *Budget Hearing on Immigration and Customs Enforcement Before the Subcomm. on Homeland Security of the H. Comm. on Appropriations*, 114th Cong. (Apr. 15, 2015), <http://appropriations.house.gov/calendar/eventsingle.aspx?EventID=394119>.

74. See Cody Mason, *Dollars and Detainees: The Growth of For-Profit Detention*, THE SENTENCING PROJECT 1 (July 19, 2012), <http://www.sentencingproject.org/publications/dollars->

the criminal justice setting, the 9/11 terror attacks opened the door for the private prison industry to see its next market share in the immigration detention business. This is because the policies that comprised the “War on Terror” involved heightened enforcement against non-citizens, including detention. It is important to note, however, that the majority of immigration detention beds were turned over to these for-profit entities for reasons other than their track record:

For-profit prisons did not enter the immigrant detention business based on a track record of successfully providing detention services. The rise of this industry has been attributed to a combination of factors, including the trend toward privatization of government services, the ability of private contractors to create detention capacity more rapidly than government . . . , rising demand for detention and prison beds . . . , and the lack of accountability to DHS-ICE by state and local contractors.⁷⁵

The first privately owned immigration detention facility was opened in 1984 by Corrections Corporation of America (CCA),⁷⁶ and the GEO Group (GEO) received its first immigrant detention contract in 1987.⁷⁷ The era described as the “War on Immigrants”⁷⁸ brought about by the legislative criminalization of immigrants created the opportunity for private companies to get into the business of incarcerating immigrants. Today, private companies operate sixty-two

and-detainees-the-growth-of-for-profit-detention/ (“The War on Drugs and harsh sentencing laws led to explosive growth in state and federal prison populations in the 1980s. The massive rise in prisoners overwhelmed government budgets and resources, and created opportunities for private prison companies to flourish. In 2010, one in every 13 prisoners in the U.S. was held by for-profit companies.”).

75. *Unlocking Human Dignity: A Plan to Transform the U.S. Immigrant Detention System*, U.S. CONFERENCE OF CATHOLIC BISHOPS & CENTER FOR MIGRATION STUDIES 25–26 (2015), <http://www.usccb.org/about/migration-and-refugee-services/upload/unlocking-human-dignity.pdf>.

76. Philip L. Torrey, *Rethinking Immigration’s Mandatory Detention Regime: Politics, Profit, and the Meaning of “Custody,”* 48 U. MICH. J.L. REFORM 879, 899 (2015). Recently, CCA announced a company name change to “CoreCivic,” “Corrections Corporation of America Rebrands as CoreCivic.” See Bethany Davis, *Corrections Corporation of America Rebrands as CoreCivic*, INSIDECCA, (Oct. 28, 2016, 11:00 AM), <http://www.cca.com/insidecca/corrections-corporation-of-america-rebrands-as-corecivic>. However, this Article will refer to the company as CCA.

77. *Unlocking Human Dignity: A Plan to Transform the U.S. Immigrant Detention System*, CENTER FOR MIGRATION STUDIES & U.S. CONFERENCE OF CATHOLIC BISHOPS 25 (2015), <http://www.usccb.org/about/migration-and-refugee-services/upload/unlocking-human-dignity.pdf>.

78. See Cheryl Little, *The War on Immigrants: Stories from the Front Lines*, AMERICAS QUARTERLY (Summer 2008), <http://www.americasquarterly.org/node/305> (“The U.S. Government’s War on Terror has transgressed into a War on Immigrants.”).

percent of the immigration detention beds⁷⁹ and run nine out of ten of the largest immigration detention centers.⁸⁰

The bed quota has been linked to the fact that detention costs for undocumented immigrants have more than doubled since 2006, to the present figure of \$2.8 billion annually.⁸¹ Detention costs have steadily increased despite the fact that the unauthorized entry at the U.S. border have dropped by two-thirds.⁸² Correspondingly, the private corporations' profits have soared. CCA and GEO have expanded their share of the private immigrant detention industry from thirty seven to forty five percent in 2014, and have experienced dramatic profit increases: CCA's profits increased from \$133,373,000 in 2007, to \$195,022,000 in 2014, and GEO's profits increased 244 percent.⁸³

Morgenthau explains the illogical story told by these statistics by casting the bed quota alongside corporate interests: "The persistence of th[e] detainee quota is less surprising in light of the fact that for-profit private prisons hold more than half of all immigration detainees."⁸⁴

One explanation for the bed quota's endurance is that it is linked to Congress members' concerns about maintaining the flow of money and jobs into their states and districts.⁸⁵ An explicit example is a question during the March 2013 House Judiciary Committee hearing posed by Pennsylvania Republican Representative Tom Marino, to then-ICE director Morton: "Why not take advantage—more advantage—of facilities like this [where it costs \$82.50 per day per detainee], and particularly in Pike County [Pennsylvania], who built a whole new facility just to house these individuals?"⁸⁶

The other way in which profit-driven interests help make sense of the bed quota's persistence relates to the private prison industry's

79. See Carson & Diaz, *supra* note 56.

80. *Id.*

81. See Sullivan, *supra* note 67.

82. *Id.*

83. Bethany Carson & Eleana Diaz, *Payoff: How Congress Ensures Private Prison Profit with an Immigrant Detention Quota* 4 (Apr. 2015), http://grassrootsleadership.org/sites/default/files/reports/quota_report_final_digital.pdf.

84. See Morgenthau, *supra* note 40.

85. *Id.*; see also Hernández, *supra* note 70, at 1509 (pointing out that local governments also profit from immigration detention, noting that "immigration prisons are particularly attractive to local political leaders because the federal government pays almost all of the costs of detention.").

86. William Selway & Margaret Newkirk, *Congress's Illegal-Immigration Detention Quota Costs \$2 Billion a Year*, BLOOMBERG (Sept. 26, 2013, 8:16 PM), <http://www.bloomberg.com/news/articles/2013-09-26/congress-illegal-immigration-detention-quota-costs-2-billion-a-year>.

spending.⁸⁷ The two corporations that have come to operate most of the immigration detention beds companies have considerable lobbying expenditures: CCA has spent over \$13 million on lobbyists since 2005, including lobbying staff for the Senate Appropriations Committee.⁸⁸ During this same period, GEO spent more than \$2.8 million on lobbying efforts.⁸⁹

Professor Philip Torrey demonstrated that for-profit prison companies' lobbying and campaign contributions seemed to have paid off. One example is in 2005, when the industry spent about \$5 million dollars, and then “[o]ver the next two years, ICE’s budget jumped from \$3.5 billion to \$4.7 billion.”⁹⁰ By 2012, for-profit prison companies held federal contracts worth approximately \$5.1 billion.⁹¹ Representative Adam Smith (D-Wash) definitively linked the detention bed quota to corporate profits, stating, “Frankly, I think if you eliminate the bed mandate, that’s the first step toward eliminating privatization, because that’s a huge thing that’s driving their profits.”⁹²

1. Contractual Occupancy Rate Guarantees

Occupancy guarantee clauses, also known as “lockup quotas,”⁹³ are characteristic of for-profit prisons in the criminal prison context. Since 2003,⁹⁴ private prison corporations have promoted and operated prisons under contracts with state and local governments which involve occupancy guarantee clauses for the duration of the contract term.⁹⁵ In 2013, three private prison companies in Arizona had contracts with the

87. See Hernández, *supra* note 70, at 1508 (“Collectively, from 2005 to early 2013, private prison companies spent approximately \$45 million lobbying state and federal politicians, including key lawmakers who have advanced proposals that would have expanded civil and criminal immigration imprisonment.”).

88. See Selway & Newkirk, *supra* note 53.

89. *Id.*

90. Torrey, *supra* note 76, at 904.

91. *Id.*

92. Roque Planas, *Bed Quota Fuels ‘Inhumane’ and ‘Unnecessary’ Immigrant Detention: Report*, THE HUFFINGTON POST (Apr. 15, 2015, 6:04 PM), http://www.huffingtonpost.com/2015/04/15/private-prison-immigrant-detention_n_7072902.html.

93. Ghita Schwartz & Silky Shah, *Ending Local Detention Quotas, Secret Perks for Corporations in Federal Contracts and Profiting Off Jailing Immigrant Families*, THE HILL (June 17, 2016, 2:12 PM), <http://thehill.com/blogs/congress-blog/judicial/283785-ending-local-detention-quotas-secret-perks-for-corporations-in>.

94. See DWN/CCR Report, *supra* note 23, at 3 (stating that guaranteed minimums “can be understood in the context of the private prison industry’s past instability and its successful pursuit of guaranteed profits.”).

95. *Criminal: How Lockup Quotas and “Low-Crime Taxes” Guarantee Profits for Private Prison Corporations*, in IN THE PUBLIC INTEREST 3 (Sept. 2013), <http://www.njjn.org/uploads/digital-library/Criminal-Lockup-Quota,-In-the-Public-Interest,-9.13.pdf>.

state that contained 100 percent inmate quotas, meaning the state is contractually obligated to keep these prisons filled to 100 percent capacity, or pay the private company for empty beds.⁹⁶

A September 2013 report published by In the Public Interest (ITPI) on prison bed occupancy guarantee clauses in the criminal prison context analyzed private prison contracts between states and local jurisdictions. ITPI identified seventy-seven such private facilities nationwide and analyzed sixty-two contracts. Of those contracts, sixty-five percent contained capacity quotas between 80 and 100 percent.⁹⁷ Amongst the negative effects of occupancy guarantee contractual clauses is that they “incentivize keeping prison beds filled, which runs counter to many states’ public policy goals of reducing the prison population and increasing efforts for inmate rehabilitation.”⁹⁸ A related consequence of these clauses has been called the “low-crime tax,” meaning that since state or local governments have to pay corporations for unused beds, taxpayers are effectively penalized when their government achieves what should in theory be the goal of lower rates of incarceration.⁹⁹

Unsurprisingly perhaps, prison corporations have brought over occupancy guarantee clauses to their business dealings with ICE. Drawing upon data received from a Freedom of Information Act (FOIA) request, the advocacy groups Detention Watch Network and the Center for Constitutional Rights published a report on this practice in the operation of immigration detention facilities. The occupancy guarantees function similarly to those in the criminal context, with an additional feature called “tiered pricing,” in which ICE receives a discount on each person detained above the guaranteed minimum.¹⁰⁰

The report states that the CCA was the first in 2003 to include an occupancy guarantee in their contract.¹⁰¹ In the intervening years, these clauses have increasingly been a part of contracts between ICE and private contractors both for detention operations and detention-

96. *Id.*

97. *Id.* at 6.

98. *Id.* at 3. Other negative implications discussed in the report are dangerous prison conditions, and the enactment of policies inconsistent with the public interest with respect to criminal justice.

99. Donald Cohen, *Lockup Quotas, Low-Crime Taxes, and the For-Profit Prison Industry*, HUFFINGTON POST (Nov. 26, 2013), http://www.huffingtonpost.com/donald-cohen/lockup-quotas-lowercrime-ta_b_3956336.html.

100. *DWN/CCR Report*, *supra* note 23, at 6.

101. *Id.* at 3.

related services.¹⁰² The report also found that “although guaranteed minimums are found formally only in contracts with private companies, subcontracting . . . means that private companies can be involved and minimums can occur in all three types of contract categories[,] including public facilities. . . .”¹⁰³ Today, out of ICE’s Enforcement and Removal’s 24 field offices, half have occupancy guarantees.¹⁰⁴ Beyond the increase in the frequency and breadth of these contractual terms, the occupancy minimums have gone up dramatically.¹⁰⁵

The Detention Watch Network and Center for Constitutional Rights’ FOIA request uncovered explicit evidence that ICE prioritizes keeping the detention facilities with occupancy guarantees full over those that do not have such contractual obligations. In an email from two ICE Enforcement and Removal Operations headquarter officials, local field offices were advised that “[t]he first priorities for funding are the 11 [field offices] that have detention facilities with guarantee minimum beds.”¹⁰⁶

The prevalence and influence of occupancy guarantees in ICE contracts with private prison companies recently gained the attention of some Congress members. In 2015, House Representatives Deutch (D-TX), Foster (D-IL), and Smith (D-WA) introduced “The Protecting Taxpayers and Communities from Local Detention Quotas Act.”¹⁰⁷ The bill, which was not voted out of subcommittee,¹⁰⁸ prohibits ICE from “negotiat[ing] with a private detention company a contract that

102. *Id.* at 3 (stating that detention-related services can include contracting with companies to provide security, transportation, and food).

103. *Id.* at 5.

104. *Id.* at 4. The report goes on to provide evidence showing that “[b]ecause GEO Group has been the most successful company in getting guaranteed minimums incorporated into their contracts, their facilities are often prioritized in order to fill local quotas.” *Id.* at 6.

105. *See id.* at 9 (“For example, the Houston Processing Center’s guaranteed minimum increased from 375 to 750 between 2003 and 2008, and at Port Isabel Detention Center, the guaranteed minimum increased from 500 to 800 between 2008 and 2014. Krome Detention Center’s guaranteed minimum also saw an increase from 250 to 450 between 2008 and 2014. For each, there is no publicly available information as to why such dramatic increases were necessary.”).

106. *Id.* at 6. In another email, one of the same ICE Enforcement and Removal Operations headquarter officials, then Acting Assistant Director for Field Operations, Phillip T. Miller, emphasized to the field offices that they should “[e]nsure that all mandatory minimum detention bed guarantees are being met and that any net cost benefits of tiered pricing or low cost beds are being realized.” *Id.* The report notes that while ICE’s spreadsheet listed 11 field offices with occupancy guarantees, the FOIA response showed that the New Orleans Field Office also is subject to a contract with a guarantee minimum, for the Jena/LaSalle Detention Facility. *Id.* (footnotes omitted).

107. H.R. 2808, 114th Cong. § 2 (2015).

108. *Id.*

contains any provision relating to a guaranteed minimum number of immigration detention beds at any specific facility.”¹⁰⁹

During a press conference introducing the bill, Representative Deutch said this about occupancy guarantee clauses:

As a businessman, I know that incentives can drive demand – incentives like [contractual occupancy guarantees] create an artificial demand for immigrant detention. While we continue efforts to eliminate the detention bed mandate, ending these prepaid detention contracts is one step towards making our immigration practices more humane and fiscally responsible.¹¹⁰

Nonetheless, these contracts prevail in the immigration detention system: As of June 2016, occupancy guarantees in contracts between ICE and private prison corporations account for approximately 13,000 beds per day, or about forty percent of the detention bed quota.¹¹¹

The affinity between the contractual occupancy guarantees and the bed quota in DHS’s appropriations legislation is evident from this exchange during a 2013 House Judiciary Committee hearing between Representative Henry Johnson and then-ICE director John Morton:

Mr. Johnson. If [privately-run] beds are unfilled, is there is a requirement that the Federal Government pay the private contractor?

Mr. Morton. Yes. . . . We do our very best not to have empty beds.

Mr. Johnson. It is kind of like you want to fill the beds up so that you will not be paying for something that you are not using. Is that correct?

Mr. Morton. This is correct. Obviously, if Congress appropriates us money, we need to make sure that we are spending it on what it was appropriated for.

109. *Id.*

110. Press Release, U.S. Reps. Ted Deutch, Bill Foster, and Adam Smith Introduce Bill Banning Local Immigrant Detention Quotas (June 18, 2015), <http://teddeutch.house.gov/news/documentsingle.aspx?DocumentID=398445>.

111. Schwartz & Shah, *supra* note 93. The contracts between CCA and ICE for the “family detention” facilities that were built to incarcerate the Central American women and children seeking refugee due to the growing gang violence in the region include an arrangement where “CCA is paid for 100 percent capacity even if the facility is, say, half full, as it has been in recent months.” See Chico Harlan, *Inside the Administration’s \$1 Billion Deal to Detain Central American Asylum Seekers*, WASH. POST (Aug. 14, 2016), https://www.washingtonpost.com/business/economy/inside-the-administrations-1-billion-deal-to-detain-central-american-asylum-seekers/2016/08/14/e47f1960-5819-11e6-9aee-8075993d73a2_story.html.

Mr. Johnson. And so we got a guaranteed payment to private, nonprofit [sic] corporations like . . . Corrections Corporation of America . . .¹¹²

The justification for occupancy guarantees, contractual and in DHS's appropriations legislation, appears to have less to do with needs related to sound immigration policy than about private prisons' profits.

2. The Momentum to Curtail Private Prisons

Because of practices like occupancy rate guarantees, the federal government in the criminal justice system has begun to cut back on its use of private prisons. On August 18, 2016, the Department of Justice (DOJ) announced that it would begin phasing out the contracting of federal prison facilities with private prison corporations.¹¹³ The DOJ has directed the Bureau of Prisons (BOP) to either decline renewing private contracts coming to an end, or to "substantially reduce its scope in a manner consistent with the law and the overall decline of the [B]ureau's inmate population."¹¹⁴

Soon after the DOJ announcement, several members of Congress have pressed DHS to follow suit.¹¹⁵ Senator Bernie Sanders (I-Vt.) and Representative Raúl Grijalva (D-Ariz.) sent a letter to DHS Secretary Jeh Johnson calling for the agency to end its use of private detention facilities.¹¹⁶ The letter highlights that like their criminal counterparts, private detention centers, have significant problems, including higher reported incidents of abuse and violence and less access to medical care

112. Torrey, *supra* note 16, at 7.

113. *Phasing Out Our Use of Private Prisons*, U.S. DEPT OF JUSTICE (Aug. 18, 2016), <https://www.justice.gov/opa/blog/phasing-out-our-use-private-prisons> [hereinafter *DOJ Announcement*].

114. *Id.*

115. Mike Lillis, *Sanders, Liberals press Obama to expand closure of private prisons*, THE HILL (Aug. 18, 2016), <http://thehill.com/homenews/administration/291925-sanders-liberals-press-obama-to-expand-closure-of-private-prisons>. Senator Patrick Leahy (D-Vt.), senior senator on the Senate Judiciary Committee, stated that the DOJ's mandate is not enough and called for these changes to be adopted by the DHS. *Id.*; see also *Comment of Senator Patrick Leahy On the Announcement by the Department of Justice Regarding Private Prisons* (Aug. 18, 2016), <https://www.leahy.senate.gov/press/comment-of-senator-patrick-leahy-on-the-announcement-by-the-department-of-justice-regarding-private-prisons>.

116. *Letter to Secretary Jeh Johnson* (Aug. 22, 2016), https://grijalva.house.gov/uploads/2016_8_22DHS_Private_prisons.pdf [hereinafter *Letter to Johnson*]; see also Chico Harlan, *Sanders, Arizona's Grijalva Call for Ending Use of Privately Run Detention Centers*, WASH. POST (Aug. 22, 2016), https://www.washingtonpost.com/business/economy/sanders-arizonas-grijalva-call-for-ending-use-of-privately-run-detention-centers/2016/08/22/f692f04a-6890-11e6-99bf-f0cf3a6449a6_story.html.

than government-operated facilities.¹¹⁷ Secretary Johnson announced that DHS will review the “current policy and practices concerning the use of private immigration detention and evaluate whether this practice should be eliminated.”¹¹⁸

Secretary Johnson’s announcement was met with internal opposition. ICE and the Customs and Border Patrol have said that ending private detention facilities would lead to overcrowding and compromise the agency’s ability to ensure border security.¹¹⁹ Immigrant rights advocates critiqued the fact that the Secretary announced a review in the first instance, stating that the agency already has the information it needs to know that contracting with private corporations is not good policy.¹²⁰ Advocates and scholars also have questioned whether the alternatives, namely government-run facilities and ankle bracelet monitoring, are progress from the vantage of non-citizens.¹²¹ It is unlikely that DHS would be able to meet the current immigration detention bed quota without contracting with private corporations, and so at the very least a decision to end corporate contracts to detain noncitizens could deliver the final blow to the provision.

C. *The Problem with Quotas Generally*

The immigration detention bed quota is a stark example of the difference between what is beneficial to corporate profits and what is good public policy. The quota constitutes a “statistical approach” to law enforcement, emphasizing more — instead of better — enforcement.¹²² It also replaces systemic ways in which to promote public safety, such as community policing, with quantitative measures of citations, arrests, and convictions.¹²³ And while the underlying motivation for imposing

117. *Letter to Johnson*, *supra* note 116.

118. *Statement by Secretary Jeh C. Johnson on Establishing a Review of Privatized Immigration Detention* (Aug. 29, 2016), <https://www.dhs.gov/news/2016/08/29/statement-secretary-jeh-c-johnson-establishing-review-privatized-immigration>.

119. Reuters, *Closing Private Detention Centers for Migrants Could Raise More Problems*, FORTUNE (Sept. 9, 2016), <http://fortune.com/2016/09/09/closing-private-detention-centers-illegal-immigrants/>.

120. Reynaldo Leanos, Jr., *DHS Will Review its Relationship with Private Prison Companies, But There Are Many Questions About What Comes Next*, PUB. RADIO INT’L (Sept. 1, 2016), <http://www.pri.org/stories/2016-09-01/dhs-will-review-its-relationship-private-prison-companies-there-are-many>.

121. *Id.*

122. Charles E. Lupia, *Statistical Justice*, 69 DEC. N.Y. ST. B.J. 16 (1997).

123. *See id.* (“[T]he results of this approach are at best temporary and unsatisfactory . . . [f]or they do not seek out the roots of crime.”).

law enforcement quotas is to manage police officers who have considerable independence, “meeting a numerical goal does not necessarily have the intended effect on the targeted offense.”¹²⁴

There have been numerous advocacy efforts challenging quotas in the policing context, one high-profile example being the litigation against the New York Police Department’s (NYPD) stop-and-frisk practice.¹²⁵ Moreover, arrest and ticket quotas are banned by law in many states, including New York, Illinois, California, and Florida.¹²⁶ Nonetheless, number-based policing remains if not explicitly, then an unsaid but understood performance standard. As one former NYPD officer put it, “[t]he culture is, you’re not working unless you are writing summonses or arresting people.”¹²⁷ The Police Executive Research Forum (PERF) estimates that 18,000 police departments across the country likely impose quotas on their officers.¹²⁸

PERF’s executive director describes the problem with quotas this way: “there is an understandable desire to have productivity from your officers[,] . . . but telling them that you want to arrest x number of people, you have to cite x number of people, it just encourages bad performance on the part of officers.”¹²⁹ A swath of bad performance resulting from enforcement quotas is the disproportionate impact of police contact and incarceration on poor communities of color.¹³⁰

124. Nathaniel Bronstein, *Police Management and Quotas: Governance in the Compstat Era*, 48 COLUM. J.L. & SOC. PROBS. 543, 556 (2015).

125. *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (noting that the stop-and-frisk practices in New York City were banned, and when Bill de Blasio became mayor, he withdrew the city’s appeal of that decision). See generally Rima Vesely-Flad, *New York City Under Siege: The Moral Politics of Policing Practices*, 1993-2013, 49 WAKE FOREST L. REV. 889, 900 (2014).

126. Joel Rose, *Despite Laws and Lawsuits, Quota-Based Policing Lingers*, NAT’L PUB. RADIO (Apr. 6, 2015), <http://www.npr.org/2015/04/04/395061810/despite-laws-and-lawsuits-quota-based-policing-lingers>.

127. *Id.* (including a statement from a former officer who described the quota as “20 and 1,” referring to twenty citations and one arrest per officer, per month).

128. *Id.* As a stark example of such bad performance, two former Atlanta police officers involved in a lawsuit over a public strip search claimed that “pulling down the pants of men in hopes of finding drugs was necessary to meet their quota of daily arrests.” *Id.* Another undesirable result of quotas is false arrests, and subsequent “dishonesty in the form of cover charges and added falsifications to increase the likelihood of conviction. . . .” David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455 (1999).

129. Rose, *supra* note 126.

130. Lupia, *supra* note 122 (“[H]istorical racism and continued resultant poverty have caused members of certain ethnic groups to have frequent brushes with the law. . . [and the result of] increased convictions. . . has been the statistic of large number of poorer persons in prison.”).

NYPD's stop-and-frisk practice,¹³¹ tied to "productivity measures,"¹³² disproportionately affected Black and Latino men.¹³³ Police officers of color have claimed that quotas disproportionately impact them in relation to their White counterparts, because they "are unwilling to perform racially discriminatory and unwarranted enforcement actions against the minority community."¹³⁴ Racial profiling has also been identified as a problem in the immigration enforcement context. Much of the advocacy and scholarship about this issue focuses on enforcement against Latinos and, particularly after the 9/11 terrorist attacks, South Asian, Arab, and Muslim non-citizens.¹³⁵ Another aspect of racial profiling in immigration enforcement that is equally concerning, but has received less attention, is its impact on black immigrants. A report by the Black Alliance for Just Immigration and the Immigrant Rights Clinic at New York University School of Law finds that more than one in five non-citizens facing removal on criminal grounds is black, even though black non-citizens comprise seven percent of the total non-citizen population.¹³⁶ The study also revealed that black non-citizens are more likely to be detained and deported for

131. Former NYC Mayor Rudolph Giuliani's "broken windows" approach to law enforcement, which prioritized low-level crimes, and former NYC Mayor Michael Bloomberg's "quality of life crimes" with the same focus, were the foundation of the NYPD's stop-and-frisk practice. See Ari Rosmarin, *The Phantom Defense: The Unavailability of the Entrapment Defense In New York City "Plain View" Marijuana Arrests*, 21 J.L. & POL'Y 189 (2012).

132. Vesely-Flad, *supra* note 125.

133. Darius Charney et. al., *Remark: Suspect Fits Description: Responses to Racial Profiling in New York City*, 14 CUNY L. REV. 57 (2010). In 2009 alone, [the NYPD's stop-and-frisk policy] resulted in over 575,000 stops of individuals. Of those who were stopped, 88% were totally innocent of any crime or offense. Fifty-four percent were black, 31% were Latino, and 9% were white." *Id.*

134. Selim Aigar & Josh Saul, *NYPD Set Arrest Quotas for Minority Cops in Their Own Communities: Suit*, N.Y. POST (Sept. 1, 2015), <http://nypost.com/2015/09/01/cop-suing-over-minority-arrest-quotas-says-he-faced-retaliation/>.

135. See, e.g., Aaron Haas, *Profiling and Immigration*, 18 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 3, 12 (2011) ("The twin trends of criminalizing and localizing immigration enforcement have created a situation in which local police are encouraged to target Hispanics for detention and arrests. This kind of profiling has already been seen in the border areas, but, as the underlying trend goes national, it can be expected that profiling will also increasingly be seen throughout the country."); Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice's 2003 Guidelines*, 25 IMMIGR. & NAT'LITY L. REV. 85, 86 (2004) ("The treatment of Arabs and Muslims after September 11 offers a lesson from current events how easily race, national origin, nationality, and religion can be abused by law enforcement."); Sameer Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 12 IMMIGR. & NAT'LITY L. REV. 545, 552 (describing a client who "was amongst the 1,200 Arab and South Asian Muslim men arrested and detained in the months following September 11").

136. The Black Alliance for Just Immigration and The New York University School of Law Immigrant Rights Clinic, *The State of Black Immigrants* (Sept. 2016), <http://www.stateofblackimmigrants.com/>.

criminal convictions than other non-citizens group.¹³⁷ With this context, mandating that tens of thousands non-citizens be detained each day seems particularly troublesome.¹³⁸

3. U.S. Immigration Law's History with Quotas

The other contextual lens that renders the detention bed quota particularly objectionable is the historical use of quotas in U.S. immigration law. The turn of the twentieth century in the United States brought about a spike in immigration due to labor demands spurred by the Industrial Revolution, and Congress responded by enacting stricter immigration controls.¹³⁹ One such measure was the temporary national origin quota enacted in 1910, which had the clear purpose of “confin[ing] immigration as much as possible to western and northern European stock.”¹⁴⁰

The 1910 quota was made permanent by enactment of the 1924 National Origins Act, which set forth a formula of determining the annual allotment of visas contingent upon the number of American citizens who could trace their ancestry to particular nations.¹⁴¹ Importantly, African Americans were excluded from the formula, meaning that they were not counted for the purpose of granted visas to Africans looking to immigrate to the United States.¹⁴² The 1952 amendments to the quota system, moreover, included specific restrictions on “colonial immigration, which disproportionately affected persons of African descent.”¹⁴³

137. *Id.*

138. Esther Yu Hsi Lee, *The Mass Deportation of Black Immigrants That You Haven't Heard About*, THINKPROGRESS (July 26, 2016), <https://thinkprogress.org/the-mass-deportation-of-black-immigrants-that-you-havent-heard-about-4c291b0c5205#fake96c80> (noting additionally that in Fiscal Year 2014, the ICE agency deported 1,203 African immigrants). For more generally on the plight of black immigrants in the U.S., see Andre Chung, *Black & Undocumented: Caribbean Immigrant's Long Fight for Citizenship*, NBC NEWS (Apr. 23, 2016), <http://www.nbcnews.com/news/nbcblk/black-undocumented-caribbean-immigrant-s-long-fight-citizenship-n557441>.

139. Richard A. Boswell, *Racism & U.S. Immigration Law: Prospects for Reform After '9/11?'*, 7 J. GENDER RACE & JUST. 315, 324 (2003).

140. *Id.* at 324–25 (citing U.S. Comm'n on Civil Rights, *The Tarnished Golden Door: Civil Rights Issues in Immigration* 8 (1980)).

141. Gabriel Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 279 (1996).

142. *Id.* at 280 (citing Immigration Act of 1924, ch. 190 § 11(d), 43 Stat. 153, 159 (amended 1952)) (establishing that “the term ‘inhabitants in continental United States in 1920’ does not include . . . the descendants of slave immigrants”).

143. *Id.* For an in-depth discussion of African immigration to the U.S., see generally Bill Ong Hing, *African Migration to the United States: Assigned to the Back of the Bus*, in PERSPECTIVES ON THE IMMIGRATION AND NATIONALITY ACT OF 1965 60 (Gabriel J. Chin & Rose Cuison

The end result of the quota system was that migration from some countries was highly favored over others, and the determination closely correlated with race.¹⁴⁴ Particularly, natives from England, Germany, Ireland, and other Western European countries were favored and migrants from Africa, Asia, and Eastern Europe were not.¹⁴⁵ Such a systematic exclusion has been described by Professors Gabriel Chin and Rose Cuison Villazor as “American apartheid.”¹⁴⁶ President Lyndon Johnson’s speech upon the passage of the 1965 Immigration and Nationality Act heralded the end of “the harsh injustice of the national origins quota system,” a result that would permit migrants to “come [to the U.S.] because of what they are, and not because of the land from which they sprung.”¹⁴⁷

II. U.S. CONSTITUTIONAL & INTERNATIONAL LAW PROBLEMS WITH THE BED QUOTA

The relationship between the government’s treatment of non-citizens and American constitutional protections is a topic that has received considerable attention from the creation of federal immigration law. Additionally, the relationship between international law and U.S. immigration law, while complicated, is important from the vantage of protecting migrants and refugees.

Villazor, eds., 2015).

144. See Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” Into the Heart of Darkness*, 73 IND. L.J. 1111, 1115–16 (1998) (positing that the “use of quotas to exclude racialized peoples . . . evolved into more subtle forms of exclusion with the transformation of racial sensibilities in modern times.”). For a discussion on the link between eugenics and the immigration quota system, see Rachel Silber, Note, *Eugenics, Family, and Immigration Law in the 1920s*, 11 GEO. IMMIG. L.J. 859 (1997).

145. GABRIEL J. CHIN & ROSE CUISON VILLAZOR, PERSPECTIVES ON THE IMMIGRATION AND NATIONALITY ACT OF 1965 3 (Gabriel J. Chin & Rose Cuison Villazor, eds., 2015). See also Jan C. Ting, “Other than a Chinaman:” *How U.S. Immigration Law Resulted From and Still Reflects a Policy of Excluding and Restricting Asian Immigration*, 4 TEMP. POL. & CIV. RTS. L. REV. 301 (1995).

146. CHIN & VILLAZOR, *supra* note 145, at 2. For a comprehensive account of U.S. immigration controls from the 1920s to 1965, see MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2003).

147. Brian Soucek, *The Last Preference: Refugees and the 1965 Immigration Act*, in CHIN & VILLAZOR, *supra* note 145, at 171. While the end of the national origins quota system lifted a significant barrier to migration to the United States, it detrimentally impacted Mexican migrants. See Jeanette Money & Kristina Victor, *The 1965 Immigration Act: The Demographic and Political Transformation of Mexicans and Mexican Americans in U.S. Border Communities*, in CHIN & VILLAZOR, *supra* note 145, at 315 (“By placing a cap on Western Hemisphere migration for the first time, it limited legal migration that had previously been virtually unlimited, at least in principle.”).

Constitutional immigration law is defined by Professor Hiroshi Motomura as “the application of constitutional norms and principles to test the validity of immigration rules.”¹⁴⁸ There was scant guidance as to this application because, while the Declaration of Independence was considerably concerned about immigration,¹⁴⁹ a decade later the nascent nation ratified the U.S. Constitution with only one reference to immigration.¹⁵⁰

Early constitutional immigration jurisprudence, as a result, was dominated by determining the allocation of immigration powers amongst the three branches of government.¹⁵¹ In doing so, the U.S. Supreme Court significantly limited judicial review over immigration matters by giving virtually absolute authority, known as the plenary power doctrine,¹⁵² to the legislative and executive branches.¹⁵³ As

148. A term coined by Professor Hiroshi Motomura, “‘constitutional immigration law’ means the application of constitutional norms and principles to test the validity of immigration rules in subconstitutional form, including statutes, regulations, and administrative guidelines.” Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 548 (1990).

149. The topic was explicitly addressed in the Declaration of Independence, as “one of the Founders’ grievances against King George was that he was limiting immigration, by trying ‘to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither[.]’” See Margaret Stock, *Immigration and the Separation of Powers*, WASH. TIMES (July 7, 2015), <http://www.washingtontimes.com/news/2015/jul/7/celebrate-liberty-month-immigration-and-the-separa/?page=all>.

150. See U.S. CONST. art. I, § 9, cl. 1 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight. . . .”). Professors Legomsky and Rodriguez also explore arguments as to whether the government’s power to regulate immigration can be derived from the Commerce Clause, the Naturalization Clause, the War Clause, or through implied Constitutional powers (including as derived from Foreign Relations power). See STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 99–104 (6th ed. 2015).

151. See Stock, *supra* note 149 (arguing that the rationale for establishing plenary power relates to the U.S. Constitution’s virtual silence on the subject of immigration); see also Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 466 (2009) (“The text of the United States Constitution nowhere enumerates a power to regulate immigration.”).

152. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUPREME COURT REV. 255, 255 (1984) (introducing the term “plenary power doctrine” and critiquing the Supreme Court’s rationales for the doctrine). For insight into the domestic and global climate in which the plenary power doctrine was devised, see Johnson, *supra* note 144, at 1113 (discussing that the plenary power doctrine was created “in an era when Congress acted with a vengeance to exclude Chinese immigrants from [America’s] shores”); see also Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 349 (2002) (“[T]he international context from which [plenary power] emerged . . . was historically characterized by the proto-anarchical nature of relations among states and the resulting need to centralize foreign policymaking in non-judicial institutions.”).

153. Cox & Rodriguez, *supra* note 151, at 460 (positing that this articulation of plenary power is indicative of jurisprudence that largely treats “the political branches as something of a singular

articulated in *The Chinese Exclusion Case*, *Chae Chang Ping v. United States*: “The decision whether and how to exclude immigrants from the United States represented a political question, not subject to review by the judiciary.”¹⁵⁴ Today, however, courts have shown less deference to the government’s power to detain immigrants by upholding challenges to indefinite and prolonged detention.

In the international legal arena, the Universal Declaration of Human Rights, adopted in 1948 by the United Nations General Assembly after World War II, emphasizes protections against arbitrary detention generally. Developments in international and U.S. immigration law with regards to these protections for noncitizens have been divergent. On the one hand, legal instruments prohibiting arbitrary detention have extended the application of their provisions beyond refugees and asylum seekers, to migrants generally. On the other hand, changes toward criminalization in U.S. immigration law and policies over the past two decades, including the expansion of the immigration detention system, have created a significant schism between the legal landscape for migrants under domestic U.S. and international human rights law.

This Part explores the immigration detention bed mandate through the lens of both the Due Process Clause of the Fifth Amendment of the U.S. Constitution and the international human rights legal frameworks addressing arbitrary detention.

A. *The Due Process Clause and Detention*

The plenary power doctrine historically has been an obstacle for non-citizens making constitutional claims concerning the manner by which the government seeks to remove them. This is due to the groundwork laid out by early constitutional immigration jurisprudence. Addressing the general applicability of the Fifth Amendment of the

entity”).

154. *Id.* at 467 (citing *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1989)). Professor Motomura defines the doctrine as establishing that “Congress and the Executive branch have broad and often exclusive authority in immigration matters” (without judicial oversight for constitutionality). Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1626 (1992). *See also* Abrams, *supra* note 9, at 601 (defining plenary power doctrine as giving “the political branches special deference when passing or executing immigration legislation, even where doing so would otherwise violate individual constitutional rights”); Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373, 375 (2004) (discussing the plenary power doctrine generally from the viewpoint of citizens, rather than non-citizens).

U.S. Constitution, the Supreme Court in *Ekiu v. United States* held that the due process clause does not override the plenary power doctrine, i.e., that concerns about due process do not require judicial oversight on matters of immigration.¹⁵⁵

Two years later came the first of two early foundational decisions on due process and detention. In *Fong Yue Ting v. United States*,¹⁵⁶ the Court reaffirmed the *Ekiu* articulation of the plenary power doctrine and upheld the government's power to detain a noncitizen pending removal. In doing so, the Court in *Fong Yue Ting* established that an "order of deportation is not punishment for a crime,"¹⁵⁷ and that an individual incarcerated for allegedly violating immigration law "has not . . . been deprived of life, liberty[,] or property, without due process of law."¹⁵⁸ Professor Daniel Kanstroom describes the *Fong Yue Ting* ruling as "impl[y]ing that the [federal government's] deportation power is essentially limitless,"¹⁵⁹ while noting that the Court modified this proposition of unbounded government power in a subsequent opinion a decade later.¹⁶⁰ Even so, the plenary power doctrine remained a virtual shield for challenging the government's detention practices.

Three years after the Supreme Court's decision in *Fong Yue Ting*, and "[o]n the very day it upheld racial segregation in *Plessy v. Ferguson*,"¹⁶¹ the Court handed down a ruling that limited the

155. *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) ("[T]he decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.").

156. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

157. *Id.* at 730.

158. *Id.* See also Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1897 (2000) (describing *Fong Yue Ting* as "the first case to determine that the source of federal deportation power was the same as the source of the power to exclude.").

159. Kanstroom, *supra* note 158, at 1897.

160. Professor Kanstroom cites *Yamataya v. Fisher*, 189 U.S. 86 (1903), for limiting the *Fong Yue Ting* ruling. Kanstroom, *supra* note 158, at 1897. Also known as *The Japanese Immigrant Case*, *Yamataya* opened the door for due process rights to apply to non-citizens by establishing that noncitizens who have already entered the U.S., even unlawfully, are entitled to more due process than those excluded at a port of entry. See *Yamataya*, 189 U.S. at 101 (stating that executive officials could not arbitrarily expel a person "without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States"). In doing so, however, the Court found that the decisions of administrative or executive officers acting under their delegated powers constituted due process of law and were not subject to judicial review. *Id.* at 102. Finding that the noncitizen had been afforded an opportunity to be heard, the *Yamataya* opinion echoed the one the Court made in *Ekiu*, namely that the process given to a noncitizen is the process due. See *id.*

161. Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1, 43 (2002).

government's detention power over Chinese immigrants.¹⁶² In *Wong Wing v. United States*,¹⁶³ the Court struck down the provision of the Chinese Exclusion Act of 1892 "which enhanced the ban against most Chinese citizens and descendants from entering the United States by imposing a sentence of hard labor for violating the prohibition."¹⁶⁴ The *Wong Wing* decision also affirmed the right for the government to detain non-citizens in conjunction with removal proceedings.¹⁶⁵ It is for this latter proposition, namely that detention imposed for administrative and not criminal purposes "is presumptively not punishment,"¹⁶⁶ that *Wong Wing* has had the greatest influence over modern constitutional immigration jurisprudence on detention.¹⁶⁷ This characterization of detention as administrative, not punitive, may be an implicit reason for the tolerance of the immigration detention bed quota.

The bed quota mandated by Congress since 2009 intersects in several ways with the jurisprudence addressing detention and the Due Process Clause of the Fifth Amendment. Having laid out the foundations of this jurisprudence above, the next sub-Part will explore current trends in the jurisprudence regarding immigration detention. In doing so, it will highlight how these developments implicate the constitutionality of the bed quota.

1. Current Trends in Immigration Detention Jurisprudence & Policy

Over the past fifteen years, and especially in the past few years, courts have ruled in favor of detainees with respect to indefinite and prolonged mandatory detention. Professor David Cole characterizes immigration detention as preventive rather than punitive, involving deprivation of "physical liberty without an adjudication of criminal

162. *See id.* ("Chinese immigrants earned a rare win from the Supreme Court in *Wong Wing v. United States*.")

163. *Wong Wing v. United States*, 163 U.S. 228 (1896).

164. Sinha, *supra* note 36, at 9.

165. Specifically, the Court asserted that "detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid." *Wong Wing*, 163 U.S. at 235. The Court continued: "Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation." *Id.*

166. Chin, *supra* note 161, at 44.

167. This is why Professor Chin states that, "[w]hile *Wong Wing* held federal action through summary process unconstitutional, in an odd way it has operated to enhance rather than restrict government authority." *Id.*

guilt.”¹⁶⁸ Professor Cole draws from this depiction of detention to contend that its “use is strictly circumscribed by due process constraints,”¹⁶⁹ a position bolstered by the waning influence of the plenary power doctrine over constitutional immigration jurisprudence, particularly in reference to detention.¹⁷⁰ So while the plenary power doctrine historically limited judicial review of due process claims over federal removal decisions, as summarized below, the judicial treatment of the modern immigration detention legal scheme has been more varied.

The modern statutory authority related to immigration detention is organized, generally speaking, in three broad categories. Two are in Section 236 of the Immigration and Nationality Act (INA), which authorizes detention during removal. The first, Section 236(a), states that “an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.”¹⁷¹ The statute provides for conditional release or a right to a bond hearing for non-citizens detained pursuant to this subsection.¹⁷² The second is Section 236(c), which is the mandatory detention provision for non-citizens detained on criminal- or terrorism-related grounds.¹⁷³ The last broad category of detention is authorized by Section 241(a) of the INA, which confers authorization to detain non-citizens with final orders of removal.

168. See David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1006 (2002) (“Immigration detention is by definition ‘preventive’ because the INS [now DHS] has no authority to detain for punitive purposes.”).

169. *Id.*

170. See, e.g., David S. Rubenstein, *Immigration Structuralism*, 8 DUKE J. CONST. L. & PUB. POL’Y 81, 99 (2013) (“For generations now, the plenary [power] doctrine has been widely assaulted as an anachronism with little descriptive or normative appeal.”); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 57 (2007) (“Despite the plenary power doctrine’s authority, it has been assailed over the years by many academics and defended, I think, by none.”); Brian G. Slocum, *Canons, the Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363, 369 (2007) (“The elimination of the plenary power doctrine would be a welcome development in immigration law.”); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 937 (1995) (stating the plenary power doctrine is a “constitutional oddity,” “has never been adequately explained” and it is time to “clean the slate”).

171. Immigration and Nationality Act of 1952 §236(a).

172. INA §236(a)(2).

173. See INA §236(c) (“The Attorney General shall take into custody any alien” who is inadmissible or deportable based on criminal or terrorism grounds, or deportable for a crime of moral turpitude “for which the alien has been sentence to a term of imprisonment of at least 1 year.”).

The first case bearing significant influence over the modern American immigration detention system is *Zadvydas v. Davis*,¹⁷⁴ which Professor Peter Spiro characterizes as “set[ting] the doctrinal stage . . . for the abandonment of plenary power.”¹⁷⁵ The Supreme Court in *Zadvydas* addressed INA Section 241(a)(6), which gives DHS discretion to detain individuals with final orders of removal past the mandated ninety day period.¹⁷⁶ The issue before the Court was whether the statute provided for indefinite detention for individuals who the government could not remove. As Professor Farrin Anello notes, “the Court relied upon basic due process principles that have become crucial to courts’ assessment of whether there is any limit to mandatory detention.”¹⁷⁷ The *Zadvydas* ruling ultimately turned on a statutory, rather than constitutional, analysis.¹⁷⁸ There, Justice Breyer, writing for the majority, characterized section 241(a)(6) as ambiguous as to whether DHS could detain individuals indefinitely, and interpreting the statute as such would cause “a serious constitutional problem.”¹⁷⁹

The following term, in *Demore v. Kim*,¹⁸⁰ the Supreme Court again considered the bearing of the Due Process Clause on immigration detention, analyzing INA section 236(c), the mandatory detention provision for individuals in removal proceedings.¹⁸¹ The *Demore* decision brought back the primacy of the plenary power doctrine, as the Court upheld the statute relying expressly on *Wong Wing* and “the political branches’ plenary power over deportation.”¹⁸²

174. *Zadvydas v. Davis*, 533 U.S. 678 (2001).

175. Spiro, *supra* note 152, at 345.

176. INA § 241(a)(2) provides for mandatory detention of individuals for ninety days after an order of removal becomes final.

177. Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363, 371–72 (2014). Professor Anello continues: “The Court rested its decision [in *Zadvydas*] on the *United States v. Salerno* line of due process cases, making clear that immigration detention was subject to the same due process limits as other forms of civil detention.” *Id.* at 372.

178. *Zadvydas*, 533 U.S. at 690.

179. *Id.* at 372 (citing *Zadvydas*, 533 U.S. at 690); *see also* Spiro, *supra* note 152, at 345 (“*Zadvydas* was by its terms not a definitive constitutional ruling; all the Court did, as a formal matter, was to interpret the relevant statute as not affording the Attorney General the power to undertake indefinite detentions. But that holding was grounded in the doctrine of serious constitutional doubt It would take no great step to convert *Zadvydas*’ exercise in statutory construction into a ruling on the constitutional merits.”).

180. 538 U.S. 510 (2003).

181. *Id.* at 513.

182. Anello, *supra* note 177, at 374. (“In the brief majority opinion, the Court dismissed the respondent’s due process claims with little constitutional analysis.”).

Recent developments, however, pose considerable challenges to the Supreme Court's decision in *Demore*. One of these challenges throws into question a factor relied upon in the majority opinion, namely the average length of time an individual is detained. The *Demore* Court "did not expressly discuss the constitutional length of pre-removal mandatory detention."¹⁸³ But it did rely on what the government contended was the average length of time to hold that "Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers that may require that persons such as respondent be detained for the brief period necessary for their removal proceedings."¹⁸⁴ The opinion stated that "the very limited time of detention" was too brief to trigger Fifth Amendment protections.¹⁸⁵

Recently, the Department of Justice (DOJ),¹⁸⁶ compelled by Freedom of Information Act requests filed by immigrant rights' organizations, admitted in a letter to the Supreme Court that they made "several significant errors"¹⁸⁷ that led them to understate the length of time individuals were held under INA Section 236(c):

Chief Justice William Rehnquist's majority opinion relied on data from the government to conclude that resolving deportation appeals 'takes an average of four months, with a median that is slightly shorter.' . . . The new estimate put the average detention period at more than a year, or more than three times the four-month estimate the Supreme Court relied on with the *Demore* ruling.¹⁸⁸

The other set of developments from *Demore* involves significant subsequent litigation on the mandatory detention statute. In one of the cases, *Jennings v. Rodriguez*,¹⁸⁹ which the Supreme Court is considering this term,¹⁹⁰ the Ninth Circuit held that detainees incarcerated for six

183. Bradley B. Baniyas, A "Substantial Argument" Against Prolonged, Pre-Removal Mandatory Detention, 11 RUTGERS RACE & L. REV. 31, 32 (2009).

184. *Kim*, 538 U.S. at 513 (emphasis added).

185. *Id.* at 530 n.12.

186. At the time *Demore* was argued and decided, the immigration agency, Immigration and Naturalization Services (INS) was under the Department of Justice, as the Department of Homeland Security was just about to operationalize.

187. Jess Bravin, *Justice Department Gave Supreme Court Incorrect Data in Immigration Case*, WALL ST. J. (Aug. 30, 2016), <http://www.wsj.com/articles/justice-department-gave-supreme-court-incorrect-data-in-immigration-case-1472569756>.

188. *Id.*

189. *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted sub nom.*, *Jennings v. Rodriguez*, 2016 WL 1182403 (U.S. June 20, 2016) (No. 15-1204).

190. The DOJ letter to the Supreme Court concerning incorrect data submitted for the *Demore* case expressly stated that the data is relevant to the *Jennings* case. Bravin, *supra* note

months pursuant to mandatory detention are entitled to bond hearings. The Second and Third Circuits also have issued holdings providing for bond hearings after six months.¹⁹¹ Most recently, the Ninth Circuit again addressed the mandatory detention statute in *Preap v. Johnson*,¹⁹² holding that the government can only hold non-citizens under INA Section 236(c) if it takes them into custody promptly upon their release from criminal custody.¹⁹³

There have also been significant developments related to non-citizens' Fifth Amendment rights in contexts other than indefinite and mandatory detention. Specifically, for vulnerable populations, there has been successful litigation for mentally disabled detainees' right to a bond hearing.¹⁹⁴ Immigrant rights' advocates have detailed and lodged formal complaints about the ways in which detained non-citizens have limited or problematic access to lawyers and other ways to prepare their cases, including guards creating unreasonable delays for meetings between attorneys and detainees, and detainees lacking access to phones and video conferencing (VTC).¹⁹⁵ In response to a complaint filed specifically about the Corrections Corporation of America's Stewart Detention Center, the company installed a VTC system so that detainees, incarcerated 150 miles from Atlanta, Georgia, have access to adequate legal representation.¹⁹⁶

187.

191. *Lora v. Shanahan*, 804 F.3d 601 (2d. Cir. 2015); *Chavez-Alvarez v. Warden York County Prison*, 783 F.3d 469 (3d. Cir. 2015).

192. *Preap v. Johnson*, 831 F.3d 1193 (9th Cir. 2016).

193. The Ninth Circuit interpreted the plain language of the statute, specifically the phrase "when . . . released," to mean upon release from criminal custody and not after the noncitizen was released and resettled into the community. *Id.* at 1207. In the latter situation, the court held that the noncitizen had a right to a bond hearing. *Id.*

194. See *Franco-Gonzales v. Holder*, No. 10-CV-02211-DMG (DTBx), 2011 WL 5966657, at *6 (C.D. Cal. 2011) (holding that the Plaintiff demonstrated a likelihood of irreparable harm and the balances of hardships tip in his favor, that granting the Plaintiff a motion for a custody hearing is in the public interest, and that the Plaintiff had exhausted administrative remedies).

195. Rhonda Brownstein, *The Corrections Corporation of America is Blocking Immigrants from Seeing their Lawyers at a Georgia Detention Center*, HUFFINGTON POST (July 5, 2016), http://www.huffingtonpost.com/rhonda-brownstein/the-corrections-corporati_b_10819892.html. See also Abira Ashfaq, *Invisible Removal, Endless Detention, Limited Relief: A Taste of Immigration Court Representation for Detained Noncitizens*, in *KEEPING OUT THE OTHER: A CRITICAL INTRODUCTION TO IMMIGRATION ENFORCEMENT TODAY* 179–203 (David C. Brotherton & Philip Kretsedemas ed., 2008).

196. *Immigrants Detained in Georgia to Get Better Access to Counsel After SPLC Complaint*, SOUTHERN POVERTY LAW CENTER (Sept. 6, 2016), <https://www.splcenter.org/news/2016/09/06/immigrants-detained-georgia-get-better-access-counsel-after-splc-complaint>.

2. Implications on the Bed Quota

The bed quota mandated by Congress through DHS's appropriations bill since 2009 warrants scrutiny, especially in light of recent jurisprudence placing limits on immigration detention. Specifically, the judicial trend towards upholding detainees' rights with respect to prolonged mandatory detention can be applied to the fact that Congress requires the agency to maintain 34,000 detention beds a day. This is especially true in light of DHS's stated policy of prioritizing the detention and removal of non-citizens who pose "threats to national security, public safety, and border security."¹⁹⁷

Moreover, as the agency demonstrated during the potential government shut down in 2013,¹⁹⁸ non-citizens who otherwise could be placed on supervised release are being detained. Congress expressly warned the Executive that these releases were a violation of the agency's appropriations terms when ICE officials were summoned by the U.S. House of Representatives' Homeland Security Committee in 2013.¹⁹⁹ If the mandate is to fill beds regardless of whether the non-citizens should be subjected to detention, then the provision is squarely in violation of the procedural due process test set forth by *Mathews v. Eldridge*.²⁰⁰ Specifically, the individual interest is a liberty interest, there does not appear to be any outweighing government interest in filling 34,000 beds a day, and there are no costly procedural safeguards at issue here.²⁰¹

In line with the recent case law concerning immigration detention, there is also a compelling statutory interpretation argument to clarify the meaning of the immigration detention bed quota. Currently, the bed quota seems to be incentivizing at best, and compelling at worst, the executive branch to detain more non-citizens than necessary and

197. These internal enforcement priority memos commenced in 2011. John Morton, U.S. Immigration and Customs Enforcement Director, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>. This policy was reinforced by DHS Secretary. Jeh Johnson, Secretary, U.S. Dept. of Homeland Security, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

198. See *supra* notes 70 and accompanying text.

199. See text accompanying *supra* note 71.

200. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The *Mathews*' balancing test weighs the burden of the deprivation of an individual's interest against the burden on the government of affording increased due process, as well as the risk of erroneous deprivation and the probable value of additional procedural safeguards. *Id.*

201. See *id.*

should be struck down under the Due Process Clause of the Fifth Amendment. Congress should be made to clarify that the DHS appropriations language of “shall maintain” does not mean the Executive must fill the beds. Whether this interpretation from a fiscal policy perspective makes sense is a question that will be explored in Part III.

B. International Law and Limits on the Use of Detention

Individual countries’ immigration law and international human rights law overlap significantly. Some assert that while nation states have sovereign power to regulate migration across their borders, “their immigration enforcement policies and practices—including those relating to administrative detention—must comport with the requirements of international human rights law.”²⁰² Professor Laura Adams points out that “[i]nternational human rights law and domestic immigration law . . . deal with many of the same fundamental issues, such as freedom from detention and the right to due process of law.”²⁰³ While intertwined, Professor Adams lays out how the criminalization of U.S. immigration laws over the last decades, including the practices of mandatory and indefinite detention, has caused a “divergence” between the two bodies of law.²⁰⁴

Nowhere is this divergence more evident perhaps than in the scale of the modern American immigration detention system. With the immigration detention bed quota at the helm of the mass incarceration of non-citizens in the U.S., this section examines the bed quota through the lens of international law and principles concerning the detention of migrants. Scholars have applied international human rights law to both particular aspects and the general use of the immigration detention system.²⁰⁵ This section hones in on how the existence and application of

202. Eleanor Acer & Jake Goodman, *Reaffirming Rights: Human Rights Protections of Migrants, Asylum Seekers, and Refugees in Immigration Detention*, 24 GEO. IMMIGR. L.J. 507, 508 (2010).

203. Laura S. Adams, *Divergence and the Dynamic Relationship Between Domestic Immigration Law and International Human Rights*, 51 EMORY L.J. 983, 999 (2002).

204. This divergence is particularly stark because, as Professor Adams points out, “[t]he criminalization of migration in the United States has occurred at the same time that the United States has accepted greatly enhanced international human rights obligations.” *Id.* at 985.

205. See, e.g., Azadeh Shahshahani & Ayah Natasha El-Sergany, *Challenging the Practice of Solitary Confinement in Immigration Detention in Georgia and Beyond*, 16 CUNY L. REV. 243, 262–68 (2013) (discussing international treaties ratified by the U.S., regional treatises, and special rapporteurs as challenging the practice of solitary confinement of immigrant detainees); Cathryn Costello, *Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law*, 19 IND. J. GLOBAL LEGAL STUD. 257, 261–63 (2012)

the bed quota specifically may violate such international norms. It does so by discussing the prohibition of arbitrary detention, as well as the standards set forth for the detention of vulnerable populations such as asylum seekers and minors.

1. Protections Related to Arbitrary Detention and Vulnerable Migrants

International human rights law advances two general principles regarding the detention of migrants: detention should be a measure of last resort, and particularly vulnerable migrants should not be detained. Professor Denise Gilman has analyzed in great detail the application of human rights norms to both the fact and extent of migrant detention in the United States.²⁰⁶ She notes that while the first focus for international human rights bodies was the detention of refugees and asylum seekers,²⁰⁷ more recently such bodies have extended the applicability of international human rights laws to the detention of migrants generally.²⁰⁸

The right to not be detained arbitrarily is a core right related to the right to personal liberty, the latter placed at the forefront in the creation of modern international human rights law with the Universal Declaration of Human Rights (UDHR).²⁰⁹ In tandem with the liberty

(addressing the dissonance between universalism and statism in understanding and advance human rights); Gwynne Skinner, *Bringing International Law to Bear on the Detention of Refugees in United States*, 16 WILLIAMETTE J. INT'L. L. & DISP. RESOL. 270 (2008).

206. Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 FORDHAM INT'L. L.J. 243 (2013).

207. *See id.* at 261–63 (“For more than forty years after the signing of the Universal Declaration of Human Rights in 1948 and the birth of modern human rights law, international bodies made little effort to analyze the application of human rights norms to immigration detention [But then beginning in the 1990s,] international human rights focused on the situation of refugees and asylum seekers in applying human rights norms to immigration detention. The UN High Commissioner for Refugees . . . first formulated specific guidelines to circumscribe the detention of refugees and asylum seekers in 1995 and then revised those guidelines shortly after in 1999.”).

208. *See id.* at 263 n.81 (citing reports by the United Nations Commission on Human Rights’ Working Group on Arbitrary Detention and the United Nations Special Rapporteur on the Human Rights of Migrants). Other international human rights bodies have addressed the American immigration detention system, but not specifically or in great detail issues pertaining to the bed quota. *See, e.g.*, INTER-AM. COMM’N ON HUMAN RIGHTS, ORG. OF AM. STATES, REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS 1, 8 (2010) (“[T]he DHS report describes the ‘unique challenges associated with the rapid expansion of ICE’s detention capacity from fewer than 7,500 beds in 1995 to over 30,000 today, as the result of congressional and other mandates.’”).

209. Article 3 of the UDHR provides: “Everyone has the right to life, liberty and security of person.” Laurent Marcoux, Jr., *Protection from Arbitrary Arrest and Detention Under International Law*, 5 B.C. INT’L & COMP. L. REV. 345, 345 (1982) (citing G.A. Res. 217 (III) A,

interest enshrined in the UDHR is Article 9's specific prohibition of "arbitrary arrest, detention or exile."²¹⁰

Decades later, the United Nations adopted the International Covenant on Civil and Political Rights (ICCPR).²¹¹ Article 9(1) of the ICCPR establishes: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."²¹² Elaborating on this ICCPR provision, the United Nations Human Rights Committee has established that "[d]etention in the course of proceedings for the control of immigration is not *per se* arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time."²¹³

Detention as a measure of last resort for migration regulation is another related overarching principle established by human rights law. Also referred to by Professor Gilman as "a presumption against detention for all migrants,"²¹⁴ the principle of detention as a last resort is articulated by international bodies such as the United Nations Working Group on Arbitrary Detention and the UN Special Rapporteur on the Human Rights of Migrants. This principle is particularly prevalent in the human rights law instruments related to the protection of vulnerable migrants.²¹⁵ Under U.S. law, asylum seekers are amongst the categories of migrants and refugees subject to mandatory detention. In 2014, ICE detained 44,270 asylum seekers, representing a three-fold increase from 2010.²¹⁶

Universal Declaration of Human Rights (Dec. 10, 1948)). Article 31(2) of The Convention Relating to the Status of Refugees, which went into effect in 1954, prohibits "restrictions on refugees' movements" outside of circumstances when those restrictions are "necessary." Skinner, *supra* note 205, at 280.

210. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

211. G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights (Mar. 23, 1976).

212. U.N. Human Rights Comm., General Comment No. 35, at 7 (Dec. 16, 2014), http://www.legal-tools.org/uploads/tx_ltpdb/G1424451.pdf.

213. *Id.* at ¶ 18.

214. Gilman, *supra* note 206, at 269.

215. An Inter-American Commission on Human Rights Report specifically stated concern for the fact that "vulnerable groups figure prominently among those being held in immigration detention." INTER-AM. COMM'N ON HUMAN RIGHTS, *supra* note 208, at 35.

216. *Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers*, HUMAN RIGHTS FIRST 11, http://www.humanrightsfirst.org/sites/default/files/Lifeline-on-Lockdown_0.pdf. To contrast, in 2010, ICE detained 15,769 asylum seekers. *Id.*

The United Nations High Commissioner for Refugees (UNHCR) Detention Guidelines, for example, begins Guideline 4 by stating: “Detention must not be arbitrary.”²¹⁷ The UNCHR Guidelines defines arbitrary broadly, to mean “not only unlawfulness, but also elements of inappropriateness, injustice and lack of predictability.”²¹⁸ It goes on to establish that “[d]etention can only be resorted to when it is determined to be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose.”²¹⁹ There also are international human rights legal norms in the form of Conventions that the United States did not ratify.²²⁰

III. POLICY CONSIDERATIONS

The immigration detention bed quota is a significant yet little-known impetus for the trend of mass incarceration in the immigration context. As Representative Adam Smith noted, “[w]e simply detain too many people, and the federal mandate [bed quota] certainly drives a lot of that.”²²¹ In the criminal context, the United States government and society more broadly are meaningfully engaging the question of how to curtail mass incarceration.²²² The same scrutiny has not been

217. U.N. High Commissioner on Refugees, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention*, at 6, 15 (2012) [hereinafter *UNHCR Guidelines*] (“The rights to liberty and security of person are fundamental human rights, reflected in the international prohibition on arbitrary detention, and supported by the right to freedom of movement.”).

218. *Id.* at 15. The United Nations Committee Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile conducted an extensive study of the meaning of “arbitrary,” and concluded that it encompasses more than illegal and came up with the following definition: “Arrest or detention is arbitrary if it is (a) on the grounds or in accordance with procedures other than those established by law or (b) under the provisions of a law, the purpose of which is incompatible with the right to liberty and security of person.” Marcoux, *supra* note 209, at 366.

219. *UNHCR Guidelines, supra* note 217, at 21. The UNHCR Guidelines are in part interpretations of earlier proclamations as to the rights of refugees, such as the Convention Relating to the Status of Refugees, promulgated in 1954, the latter which prohibits restrictions on refugees’ movements, unless such restrictions are “necessary.” Convention Relating to the Status of Refugees, art. 31(2), Apr. 22, 1954, 189 U.N.T.S. 150.

220. *See, e.g.*, G.A. Res. 44/25, Convention on the Rights of the Child, art. 37(b) (Sept. 2, 1990) (prohibiting arbitrary deprivation of liberty, and stating that the detention “of a child . . . shall be used only as a measure of last resort.”).

221. Planas, *supra* note 92.

222. *See, e.g.*, Stephanos Bibas, *The Truth About Mass Incarceration*, NAT’L REV. (Sept. 16, 2015), <http://www.nationalreview.com/article/424059/mass-incarceration-prison-reform> (arguing that “just because liberals are wrong does not mean the status quo is right” to take the position that while mass incarceration is not about race, it is still not good policy.). *See also* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004).

applied to the mass detention of non-citizens.²²³ This Part offers public policy reasons to include immigration detention, and the bed quota specifically, into the critical examination of the American mass incarceration trend.

A line of argument against an arbitrarily high quota to detain immigrants relies on the practical. A past DHS official has questioned the quota along these lines:

Former ICE director Julie Myers Wood, who led the agency from 2006 to 2008 under President George W. Bush, said a congressional mandate for ICE to maintain a minimum number of detainees was a reasonable guideline at the outset of her tenure, when the Border Patrol was making more than a million arrests per year. But today, she said, ‘it doesn’t make sense.’²²⁴

Wood’s statement highlights how the number of detention beds that make up the bed quota does not correlate to needs assessment.

Another practical reason is fiscal, including more cost effective ways to ensure that non-citizens in removal proceedings do not abscond. There are also normative arguments against the bed quota, a significant one being the importance of prosecutorial discretion in enforcing immigration law. And while shifting institutional behavior is a significant undertaking, there is compelling cause to do exactly that for immigration detention policy-making. This Part will explore these three arguments.

A. Prosecutorial Discretion

Prosecutorial discretion has been an important element of immigration enforcement, and DHS during the Obama Administration

223. See Anita Sinha, *Ending Mass Incarceration, But Not for Immigrants: A Tale of Two Policies*, HUFFINGTON POST (July 27, 2015), http://www.huffingtonpost.com/anita-sinha/ending-mass-incarceration-but-not-for-immigrants_b_7874750.html (“Conspicuously absent from this conversation, however, is the fact that immigration detention is now the ‘largest mass incarceration movement in U.S. history’”). The one exception is the current review called by the DHS Secretary on the use of private prison corporations in the operation of the detention facilities, following the DOJ announcement that the government will stop using private companies for prisons and jails. See *supra* text accompanying notes 93–112.

224. Nick Miroff, *Controversial Quota Drives Immigration Detention Boom*, WASH. POST (Oct. 13, 2013), https://www.washingtonpost.com/world/controversial-quota-drives-immigration-detention-boom/2013/10/13/09bb689e-214c-11e3-ad1a-1a919f2ed890_story.html. According to the Pew Research Center, there has been a decrease in unauthorized immigration into the United States since the “Great Recession” of 2007-2009. See JEFFREY S. PASSEL & D’VERA COHN, PEW RESEARCH CTR., UNAUTHORIZED IMMIGRANT POPULATION STABLE FOR HALF A DECADE (2015), <http://www.pewresearch.org/fact-tank/2015/07/22/unauthorized-immigrant-population-stable-for-half-a-decade/>.

has emphasized its importance. Professor Shoba Sivaprasad Wadhia, in her book *Beyond Deportation*, states: “A favorable exercise of prosecutorial discretion in immigration law identifies the agency’s authority to refrain from asserting the full scope of the agency’s enforcement authority in a particular case.”²²⁵ This articulation of discretion in immigration enforcement presents how the Congressional bed quota may be in tension with the Executive’s authority to detain and removal noncitizens.

Prosecutorial discretion “has its historical underpinnings in the executive branch’s authority, both implicit and explicit, to determine which individuals, who otherwise have no valid immigration status, may remain in the United States.”²²⁶ It was a tool emphasized by the General Counsel in 1976 of then-Immigration and Naturalization Services (INS).²²⁷ From this time to the present, the discretion whether to arrest, detain, and remove a non-citizen from the United States was presented as being grounded in both economic and humanitarian concerns.²²⁸

With a significantly overburdened immigration enforcement and court system today, prosecutorial discretion has taken on renewed importance. Former ICE director John Morton issued guidance in 2011 on the exercise of prosecutorial discretion as a way to encourage field offices to use it in individual matters, and described its importance this way:

ICE must prioritize the use of its enforcement personnel, detention space, and removal assets to ensure that the aliens it removes represent, as much as reasonably possible, the agency’s enforcement priorities, namely the promotion of national security, border security, public safety, and the integrity of the immigration system.²²⁹

225. WADHIA, *supra* note 19, at 7.

226. Erin Corcoran, *Seek Justice, Not Just Deportation: How to Improve Prosecutorial Discretion in Immigration Law*, 48 LOY. L.A. L. REV. 119, 134–35 (2014).

227. Madison Burga & Angelina Lerma, *The Use of Prosecutorial Discretion in the Immigration Context After the 2013 ICE Directive: Families are Still Being Torn Apart*, 42 W. ST. L. REV. 25, 29 (2014); *see also* Maria A. Fufidio, Note, “*You May Say I’m a Dreamer, but I’m not the Only One*”: *Categorical Prosecutorial Discretion and its Consequences for US Immigration Law*, 36 FORDHAM INT’L L.J. 976, 986 (2013) (“[I]mmigration officials have been granting discretionary relief from deportation to immigrants prior to the formal recognition of this practice in the mid-1970s.”).

228. *See* Burga & Lerma, *supra* note 227, at 30 (discussing the two principles of economic constraints and humanitarian concerns in using prosecutorial discretion).

229. JOHN MORTON, U.S. DEP’T OF HOMELAND SEC., U.S. IMMIGRATION & CUSTOMS ENF’T, EXERCISING PROSECUTORIAL DISCRETION CONSISTENT WITH THE CIVIL IMMIGRATION ENFORCEMENT PRIORITIES OF THE AGENCY FOR THE APPREHENSION, DETENTION, AND

Professor Wadhia echoes this economic justification in the form of limited government resources as one of the theories animating prosecutorial discretion.²³⁰ Harkening back to the articulation made over 40 years ago, Wadhia also presents the humanitarian purpose of prosecutorial discretion, namely not apprehending, detaining, or removing individuals who violated immigration law but otherwise have redeeming equities or who may be victims of crimes or disasters.²³¹

As highlighted by the DACA and DAPA programs, the Executive has exercised prosecutorial discretion for groups, in addition to using it to make individual determinations. As discussed in the Introduction,²³² with the *United States v. Texas* judicial impasse the role of prosecutorial discretion for the former use is still an open question. However, these legal challenges do not implicate the long-standing principle that the Executive has discretion over whether to detain and pursue removal on a case-by-case basis. It is in this latter realm on which the Congressional bed quota appears to be encroaching.

B. Alternatives to Detention

Institutional confinement of non-citizens in removal proceedings is not the only way to ensure that they do not abscond. There are community-based Alternatives to Detention (“ATD”), which include electronic monitoring such as wearing ankle bracelets, check-ins with DHS, and curfews.²³³ In 2004, ICE created the Intensive Supervision Appearance Program (ISAP) as for low priority non-citizens in removal proceedings, and have initiated other programs over the years.²³⁴ ATD has been recommended for vulnerable populations, such as LGBT detainees.²³⁵ The financial cost of the U.S. federal government detaining non-citizens during their removal proceedings as opposed to

REMOVAL OF ALIENS (2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

230. WADHIA, *supra* note 19, at 8.

231. *Id.*

232. *See supra* notes 11–13 and accompanying text.

233. Torrey, *supra* note 16, at 6.

234. Maria Mendoza, *A System in Need of Repair: The Inhumane Treatment of Detainees In the U.S. Immigration Detention System*, 41 N.C. J. INT’L LAW 405, 445 (2016) (“In 2007, ICE introduced the Enhanced Supervision/Reporting Program (‘ESR’), which uses several of the same procedures as ISAP, in addition to supervisory tools such as residence verification. At present, ‘ISAP and ESR . . . can supervise 6,000 and 7,000 individuals, respectively.’”).

235. *See* Shana Tabak & Rachel Levitan, *LGBTI Migrants in Immigration Detention: A Global Perspective*, 37 HARV. J.L. & GENDER 1, 44 (2014) (“Ultimately, states should heed the recommendations by UNHCR . . . by providing alternatives to detention for all self-identifying sexual minorities.”).

using an ATD is significant: Immigration detention costs taxpayers about \$160 per person, per day; ATD costs anywhere from 17 cents to about \$18 per person, per day.²³⁶

The conservative research institute Center for Immigration Studies has described the purpose of Congress' immigration bed quota as "ensur[ing] that ICE is doing its job of facilitating suspected removable aliens' appearance in immigration court, and if applicable, compliance with removal orders."²³⁷ ATD, however, have been proven to be as effective as detention in achieving these objectives. Non-citizens who participated in one ATD study demonstrated a 91 percent success rate for appearing at all their court hearings, with asylum seekers at a slightly higher rate of 93 percent.²³⁸ According to Human Rights First, in Fiscal Year 2014 participants of ISAP had a 99 percent appearance rate for their final removal hearing.²³⁹

The Obama Administration, for Fiscal Year 2016, requested from Congress increased funding for its ATD programs.²⁴⁰ In response, the Chair of the House Commerce-Justice-Science Subcommittee, John Culberson, raised the immigration detention bed quota, stating that an "increased use of alternative methods does not mean Congress should step back from its bed quota."²⁴¹ This statement is at odds with an underlying purpose of ATD programs, which is to spend less money on brick and mortar detention. Representative Culberson's statement is in line with the argument that the bed quota is a "message to ICE that its policy should favor detaining a large number of aliens regardless of whether that detention makes sense from an economic or security

236. LUTHERAN IMMIGRATION AND REFUGEE SERV., ALTERNATIVES TO DETENTION: HISTORY AND BACKGROUND (2013), <http://lirs.org/wp-content/uploads/2014/01/LIRS-Backgrounder-on-Alternatives-to-Detention-12-6-13.pdf>.

237. Eric Brickenstein, *Making Bail and Melting Ice*, 19 LEWIS & CLARK L. REV. 229, 230 (2015) (citing Jessica Vaughan, *Enforcement Metrics Support Case for Detention Bed Mandate*, CENTER FOR IMMIGR. STUD. (Nov. 24, 2013), <http://cis.org/vaughan/enforcement-metrics-support-case-detention-bed-mandate>)).

238. U.S. COMM'N ON CIVIL RIGHTS, STATUTORY ENFORCEMENT REPORT: WITH LIBERTY AND JUSTICE FOR ALL: THE STATE OF CIVIL RIGHTS AT IMMIGRATION DETENTION FACILITIES, at 65 (Sept. 2015), http://usccr.gov/pubs/Statutory_Enforcement_Report2015.pdf. See also Mark Noferi, *Making Civil Immigration Detention "Civil," and Examining the Emerging U.S. Civil Detention Paradigm*, 27 J. C.R. & ECON. DEV. 533, 569 (2014) ("Immigration detention has the dual goal of preventing flight before deportation, which can be adequately addressed through less restrictive measures than incarceration.").

239. HUMAN RIGHTS FIRST, IMMIGRATION DETENTION: HOW CAN THE GOVERNMENT CUT COSTS?, (2013), <http://www.humanrightsfirst.org/uploads/pdfs/immigration-detention-fact-sheet-jan-2013.pdf>.

240. Chacko, *supra* note 30.

241. *Id.*

perspective.”²⁴² This implication, however, does not comport with what is in the best interest of society.

C. *Shifting Institutional Behavior*

As with the scaling back of mass incarceration in the criminal justice context, ensuring that the detention of non-citizens in the United States is in line with sound public policy will require considerable changes, including contending with the role of profit-driven stakeholders. Congress’ inclusion of a daily quota of 34,000 beds in DHS’s appropriations has fueled institutional dependency on locking up non-citizens regardless of whether it is good public policy.

Professor César Cuauhtémoc García Hernández describes the immigration detention bed quota as indicative of a “path-dependent approach to imprisonment.”²⁴³ This approach encompasses institutional behavior where future decisions are effected by previous policy decisions, and so path-dependent choices are particularly difficult to reverse. In the criminal justice context, Professor Michelle Alexander emphasizes the role of private-sector investment and prison profiteers in mass incarceration.²⁴⁴ In the case of the detention bed quota, “shifting away from imprisonment would require that DHS empty thousands of prison beds that Congress currently requires it to pay for and that it has made a habit of filling.”²⁴⁵

A shift after the November 2016 election results is not promising. One indicator is the surge in the stock prices of the two largest prison corporations, CCA and GEO Group.²⁴⁶ Security analysts attribute the spike in share prices to the likelihood of policies that would “further necessitate a sizable contract detention population.”²⁴⁷ This anticipated new political climate may, however, alter the need for imposing a quota on DHS, which could in the future help shift policies away from the mass detention of non-citizens.

242. Brickenstein, *supra* note 237, at 240.

243. Hernández, *supra* note 70, at 1504.

244. See ALEXANDER, *supra* note 222, at 218–20.

245. Hernández, *supra* note 70, at 1505.

246. Tracy Alloway & Lily Katz, *Private Prison Stocks Are Surging After Trump’s Win*, BLOOMBERG (Nov. 9, 2016), <https://www.bloomberg.com/news/articles/2016-11-09/private-prison-stocks-are-surg-ing-after-trump-s-win>.

247. *Id.*

CONCLUSION

The immigration detention bed quota imposed by Congress since 2009 has been a largely invisible force behind a swollen system. As a law enforcement quota through the Legislative branch on an executive agency tasked with the enforcement at issue, it is unprecedented and unmatched. The bed quota is becoming even more of an outlier with trends in constitutional immigration law concerning the application of due process limitations on detention, and developments moving away from private prison corporations' influence in the U.S. criminal justice system. International human rights law and public policy considerations contribute to a case for re-thinking the immigration detention bed quota.